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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the District of Columbia

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Petitioner, The Emporium Capwell Co., respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 29, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia,[1] the decision of the National Labor Relations Board,[2] and the decision of the Trial Examiner[3] appear in the Appendix hereto. The Trial Examiner found that the Emporium (Petitioner here and Intervenor below) did not commit any unfair labor practice. The NLRB agreed and dismissed the complaint. The Court of Appeals reversed, remanding the case to the NLRB for reconsideration.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973. The time for filing this Petition for Certiorari was extended to October 27, 1973. This Court has jurisdiction under 28 U.S.C. §1254(1). The Court of Appeals took jurisdiction under §10(f) of the Labor Management Relations Act.[4]

QUESTIONS PRESENTED

I. May a minority use concerted action to force its employer to bargain with it on racial matters, even though the employer has a duty to bargain exclusively with a union?

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[1] *Western Addition Community Organization v. National Labor Relations Board*, No. 71-1656 (D.C. Cir. 1973).

[2] *The Emporium*, 192 N.L.R.B. No. 19 (1971).

[3] Trial Examiner's Decision, appended to the Board's decision at 192 N.L.R.B. No. 19 (1971).

[4] 29 U.S.C. §160(f).

II. Should the NLRB become an additional forum to protect minority activities which are in derogation of, or without the sanction of, the majority representative?

III. Are otherwise unprotected activities of a minority against its employer protected by the LMRA merely because the union is arguably failing to remedy alleged discrimination by the most "expedient" and "efficacious" means?

IV. Does Title VII of the Civil Rights Act of 1964 modify the LMRA so that otherwise unprotected activities of a minority directed at racial discrimination become protected by the LMRA?

V. How can the LMRA and Title VII of the Civil Rights Act of 1964 be accommodated without destroying the exclusivity principle of the LMRA?

STATUTORY PROVISIONS INVOLVED

Section 9(a) and 7 of the Labor Management Relations Act (LMRA) are fully set out in the Appendix.

The pertinent section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), is set out fully in the Appendix. The Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981, 1983 are set out fully in the Appendix.

STATEMENT OF THE CASE

In 1968 several department store employees complained to their Union (Local 1100) of alleged racial discrimination by their employer, the Emporium Capwell Co., the Petitioner here. The contract prohibited such discrimination. The Union agreed to, and did, investigate and prosecute their grievances.

Two of the employees disrupted the ensuing adjustment board proceedings where the union was presenting evidence in support of their individual charges of discrimination. The employees had been urged by representatives of the Equal Employment Opportunity Commission of the United States (EEOC) and the California Fair Employment Practices Commission (FEPC) to pursue the contractual grievance procedures. There was no evidence that their grievances were not being vigorously processed on an individual basis. Nevertheless, they refused to give testimony, walked out of the hearing, and as self-appointed representatives of all minorities demanded to bargain with the President of the Emporium on a group basis. They held a press conference, and engaged in picketing and handbilling, using libelous and vituperative language throughout, referring to slave conditions at the Emporium and characterizing the employer as a racist pig. Continuing their activities after two warnings, the employees were terminated.

The Trial Examiner and the NLRB held that the activities were not protected by the Labor Management Relations Act. The Court of Appeals reversed

on the grounds that the policy set forth in Title VII of the Civil Rights Act of 1964[5] modified the doctrine of exclusivity in the LMRA. Thus, the Court read Title VII[6] as giving racial minorities special rights, transcending the usual exclusive representation rights of the majority representative.

On remand the Court of Appeals would have the Board consider two questions as determinative of whether the employees' activities were protected by the LMRA: (a) ". . . whether the Union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" and (b) whether the conduct of the employees was so "disloyal" as to justify the discharges.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CONFLICTS WITH DECISIONS OF THE SEVENTH AND NINTH CIRCUITS.

In 1972, the Seventh Circuit held unprotected the picketing of an employer by a minority employee protesting an alleged discriminatory failure to promote. *Moore v. Sunbeam Corp.*[7] The Court accepted the Board's view that the no-strike clause of the contract prohibited such conduct, noting the national policy favoring arbitration rather than coercive activity.

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[5] 42 U.S.C. §2000e.

[6] 42 U.S.C. §2000e-3(a).

[7] *Moore v. Sunbeam Corporation*, 459 F.2d 811 (7th Cir., 1972).

Similarly, the Ninth Circuit in *N.L.R.B. v. Tanner Motor Livery*[8] twice vacated the orders of the Board, reinstating two employees discharged for picketing their employer in protest of alleged discrimination. The Court ruled that minorities must "first ... seek action by a union majority" or otherwise their concerted activities are not protected by the LMRA.[9]

Both decisions are in clear conflict with the Court of Appeals decision in this case, which declares that Title VII creates an exception to Section 9(a) of LMRA.[10] That conflict should be resolved and, absent legislation, can only be resolved by this Court.

II. THE DECISION OF THE COURT OF APPEALS UNDERMINES A CENTRAL PRINCIPLE OF OUR NATIONAL LABOR POLICY, i.e., THE EXCLUSIVE REPRESENTATION OF EMPLOYEES BY UNIONS.

Exclusivity, of course, is plainly required by Section 9(a) of the LMRA. Employers can and must bargain exclusively with the majority representative. Exclusivity has been unswervingly applied by the NLRB for 38 years and strengthened by many decisions of this Court. That principle will be greatly impaired if the Court of Appeals Decision stands.

Exclusivity is necessary for management and unions in bargaining and in the administration of contracts. Management must know with whom to bar-

[8] *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1964) and 419 F.2d 216 (9th Cir. 1969).

[9] 419 F.2d at 221.

[10] 29 U.S.C. §159(a).

gain and to whom it can look for finality in bargaining responsibility. Unions must sort out collective and individual rights in order to present a strong united front. Inevitably, minority interests must be subordinated to common goals.

The labor stability achieved in the American experience depends upon collective bargaining with exclusive representation, enforceable contracts, and a preference for arbitration.

By creating an exception to the principle of exclusivity in the case of minority grievances, the Circuit Court has cast doubt on the validity of established rights and duties of employers and unions. Those legal guidelines developed by 38 years of experience and case law rest upon the principle of exclusivity. It is difficult to see how the present collective bargaining system can continue without maintaining the principle of exclusive representation.

III. THE LAW IS UNCLEAR AS TO THE RIGHTS OF MINORITIES TO ENGAGE IN CONCERTED ACTIVITIES WHEN THEY ARE REPRESENTED BY A UNION. THIS COURT SHOULD CLARIFY THE RELATIONSHIP BETWEEN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND SECTIONS 7 AND 9(a) OF THE LMRA.

The decision of the Court of Appeals for the District of Columbia states that Title VII modifies the provisions of the LMRA[11] with respect to the protected status of racial minorities engaging in concerted activities. The law remains uncertain, particu-

[11] 29 U.S.C. §157.

larly because of the conflict with the other Circuits.[12] In the absence of further legislation, only this Court can clarify the law by determining what accommodation, if any, should be made between the two Acts.[13] This Court should make that clarification.

IV. THERE IS NO NEED TO FASHION A NEW REMEDY UNDER THE LMRA SINCE THE RIGHTS OF MINORITIES ARE ADEQUATELY PROTECTED ELSEWHERE.

Numerous remedies are already available safeguarding rights of minorities in the collective bargaining context:

(a) the Civil Rights Acts of 1870 and 1871[14] and Title VII of the Civil Rights Act of 1964. (the minority employees involved in this case are plaintiffs in a pending action under the Civil Rights Acts of 1870 and 1964).[15]

(b) the Fair Employment Practices Acts of the States;

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[12]The Board and the Courts have long struggled with the rights of non-racial minorities to engage in concerted activities. The result has been a confusion among the tests to be applied and this confusion has carried over in the racial cases. See e.g., *N.L.R.B. v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B. v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *N.L.R.B. v. Draper Co.*, 145 F.2d 199 (4th Cir. 1944); *Western Addition Community Organization v. N.L.R.B.*, *supra* (dissenting opinion); *United Parcel Service*, 205 N.L.R.B. No. 163 (1973) (dissenting opinion).

[13]An accommodation has been reached where the minority activity is illegal. It is not protected. *McDonnell Douglas Corp. v. Green*, ... U.S. ..... 36 L.E.2d 668, 678 (1973).

[14]42 U.S.C. §§1981, 1983.

[15]*Western Addition Community Organization v. The Emporium*, C-71-2137 CBR.

(c) grievance procedures of collective agreements;

(d) Section 9(a) protects an individual's right to process grievances without the intervention of the bargaining representative;

(e) the duty of fair representation is enforced both by the NLRB and by the Courts.[16]

There is no justification for making the NLRB yet another forum to decide such cases.

CONCLUSION

For all the above reasons, and particularly to resolve the conflict among the Circuits and to clarify the rights of minority concerted action with the requirements of exclusive representation, Petitioner prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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Attorneys for Petitioner.

October, 1973.

(Appendix Follows)

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[16]*Cargo Handlers, Inc.*, 159 N.L.R.B. 321 (1966); *Vaca v. Sipes*, 386 U.S. 171 (1967).

Appendix

Appendix

DECISION OF CIRCUIT COURT OF APPEALS FOR DISTRICT OF COLUMBIA IN WESTERN ADDITION COMMUNITY ORGANIZATION NLRB

(OFFICIAL TEXT)

United States Court Of Appeals
for the District of Columbia Circuit

No. 71-1656

Western Addition Community Organization

vs.

National Labor Relations Board, Respondent
The Emporium Capwell Company, Intervenor
for the District of Columbia Circuit.

Decided June 29, 1973

Kenneth Hecht of the bar of the Supreme Court of California, *pro hac vice,* by special leave of Court, with whom *Edward Steinman* and *Lee M. Modjeska* were on the brief, for petitioner.

Stephen C. Yohay, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court with whom *Marcel Mallet-Prevost,* Assistant General Counsel, and *Abigail Cooley Baskir,* Attorney, National Labor Relations Board, were on the brief, for respondent.

George O. Bahrs was on the brief for intervenor.

Martin I. Slate, Attorney, Equal Employment Opportunity Commission, of the bar of the United States District Court for the District of Columbia *pro hac vice,* by special leave of Court with whom *Julia P. Cooper,* Chief, Appellate Section, Equal Employment Opportunity Commission, was on the brief for Equal Employment Opportunity Commission as amicus curiae urging reversal.

Before ROBINSON and MACKINNON, *Circuit Judges,* and CHARLES WYZANSKI* *Senior U.S. District Judge* for the District of Massachusetts.

Opinion for the court filed by *Circuit Judge* MACKINNON.

Dissenting opinion filed by *Senior District Judge* WYZANSKI.

Western Addition Community Organization v. N.L.R.B. No. 71-1656

MACKINNON, *Circuit Judge:* This case is before us on the petition of the Western Addition Community Organization to review an order[1] of the National Labor Relations Board which dismissed a complaint issued against the Emporium (hereinafter referred to as the Company) for alleged violations of section 8(a) (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. (hereinafter referred

*Sitting by designation pursuant to Title 28 U.S.C. Section 294(d) (1970).

[1]The Board's decision is reported at 192 NLRB No. 19, 77 LRRM 1669 (1971).

to as the Act).[2] The Company is engaged in the operation of a retail department store in San Francisco, and was a member of a multi-employer group, the Retailer's Council, which served as its bargaining agent. The Retailer's Council, was a signatory to a collective bargaining agreement with the Department Store Employees Union (hereinafter the Union) which was the exclusive representative of the Company's employees employed in the stock and marking areas at the store. The applicable collective bargaining agreement contained an anti-discrimination clause[3] and provided that grievances arising out of the agreement "may be referred to the Adjustment Board,"[4] and possibly submitted to arbitration.[5] The agreement also contained no-strike and no-lockout clauses.

In a series of meetings in early April 1968, a group of Company employees including Tom Hawkins and James Joseph Hollins submitted to the Union representatives a list of grievances in which the employees

[2]Section 8(a)(1), 29 U.S.C. § 158(a)(1) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[3]The clause provided:

Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."

[4]Section 5(B) of the agreement provided:

Section 5 (B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement."

[5]The agreement provided that if after considering a submitted issue for one week the Adjustment Board was unable to reach a settlement, either party could *insist upon binding arbitration.*

contended that the Company was discriminating against racial minorities. Claiming that racial bias had caused minority employees to be denied promotions, the employees at the outset centered their complaint and specifically charged that employee Russel Young had been denied advancement solely because he was Black. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a Union committee to investigate the allegations, and later that month prepared a detailed report outlining the employees' contentions which "raised . . . the possibility [not solely of Young's complaint but] of *racial discrimination.*"[6] (Emphasis added.) Shortly thereafter, Johnson presented his report to the Retailer's Council, where it was agreed that the grievances should be taken directly to the Company. Accordingly, in mid-April Johnson met with the Company labor relations manager and it was agreed that the Company "would look into" the situation and "see what they could do."[7]

In May, a group of ten employees requested an additional meeting with Johnson. The problem of racial discrimination in general and the Russel Young case in particular were again discussed, however,

[6]This report stated:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

[7]Trial Examiner's Decision, appended to the Board's decision 192 NLRB No. 19, (hereinafter cited as TXD) at 3.

since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return.

On about September 3, Johnson again met with the employees including Hawkins and Hollins, and with representatives of the Fair Employment Practices Committee (FEPC) and the Economic Opportunity Council (EOC), and announced that the Union had considered the problem and had concluded that the Company had been acting discriminatorily. Further, the Union stated that it would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure, Johnson pointed out that the arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having immediate interest in the problem, but "other people involved in it" as well.[8]

[8]Johnson further testified at the hearing before the Trial Examiner:

> [W]e wanted to process *these grievances* and *we felt that there were problems of discrimination* and it was my own personal feeling that *all the discriminatory acts should be processed and that we ought to follow through and take care of it* (A. 136).
>
> • • •
>
> [I]t was my feeling certain acts had to take place in order that *everybody* at the Emporium would have an opportunity not only to have a job, but to advance into positions (A. 137).
>
> • • •
>
> I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question (A. 136-137). (Emphasis added.)

References are to the appendix in this case.

However, the program outlined by Johnson did not satisfy all of the employees. Some of those present expressed "frustration" with the situation and requested that the Union picket the Company's store. Johnson rejected the idea and explained that the Union was bound to seek satisfaction of grievances according to the terms of the collective bargaining agreement. He also stated that though he told the minority employees, including Hawkins and Hollins, that it was his advice that they follow the Adjustment Board and arbitration procedures, he stated that "if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals."[9] The EOC and FEPC representatives also recommended that the contract procedures be followed.

The next day Johnson wrote the general manager of the Retailer's Council requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting. Johnson told the Council

> We specifically charge the Emporium with violations of [the anti-discrimination clause] of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position. We are ready to proceed to immediate arbitration if the Emporium is agreeable.[10]

In response to this letter, on October 16 a meeting was convened of the Adjustment Board.

[9]Append. at 149.

[10]TXD at 4.

As the meeting began, Union Agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins who, speaking for himself and three other employees[11], read a prepared statement objecting to the prosecution of grievances on an individual basis. Those employees did not want to "speak as individuals," but would act only "as a group."[12] Further, Hollins stated that the group "wanted to talk to the President of the Emporium and wouldn't talk to anybody else, since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium."[13] Then, after refusing to give any testi-

[11]The other employees were identified at Hawkins, Epps and Washington.

[12]Hawkins testified:

> The sense was that they [i.e., the Union] wanted to do something, but they wanted to go through the procedure of this retailers counciling [*sic*] and it was going to be individually when it came about when we were still talking group matters.
>
> [I]t was individual persons that would say something and on their behalf they would take it into consideration instead of a group matter that we were talking about.
>
> Q. Was this way of proceeding that the union seemed to want to follow acceptable to you?
>
> A. No, it wasn't.
>
> Q. Why not?
>
> A. Because we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few. Like Mr. Young, he was the only one that really got something out of the deal, he got a promotion. (Append. at 48-9).

Hollins testified:

> I said that we didn't want to stay for the meeting that we didn't feel like the meeting [of the Adjustment Board] was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case. (Append. at 114).

[13]Append. at 13.

mony regarding individual employees' complaints, the four walked out of the meeting. A second meeting was held of the Adjustment Board two days later, but none of the four attended.[14]

Shortly thereafter, Hollins went to the Company president requesting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store."[15] The Company president would not speak to Hollins, but suggested that he talk instead to the Company's personnel director. Hollins refused to talk to the personnel manager, having previously spoken to him about the situation.

Hawkins and Hollins, together with several other employees, called a press conference on October 22 which was attended by representatives of the press, radio and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were planning to picket the store. Hollins also read a handbill which the group intended to distribute to the public, and further stated that they "were planning on leafleting and boycotting the store because [they] felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was [sic]

[14]The record is unclear as to what transpired at this meeting. The record does indicate that two minority employees were promoted by the Company in the fall of 1968 before the November picketing. TXD at 5.

[15]Append. at 121.

concerned."[16] On the following Saturday, November 2, Hollins, Hawkins and two other employees picketed the store from 9:30 a.m. to 6 p.m., distributing the following handbill to people entering and leaving the store:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

We welcome the support of our brothers and sisters from the churches, union, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor Peoples Institute.

While the picketing was in progress, Johnson spoke with Hollis telling him that he did not want to see

[16]Append. at 82.

Hollins fired and suggested that the only way to resolve the matter was through arbitration under the collective bargaining agreement. Hollins responded that they only wanted to talk with the Company president.

On November 7 Hollins and Hawkins were called to the office of the Company's manager of labor relations and given a written warning to refrain from the picketing or possibly be fired.[17] Despite this warning, the two again picketed the store and distributed leaflets the following Saturday. Accordingly, on Monday, November 11, Hollins and Hawkins were fired.[18] The Union subsequently filed a protest with the Retailer's Council challenging the discharges of Hollins and Hawkins, though the Union did not initiate the present action.

[17]The warning message to Hollins read:

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

The message given to Hawkins was essentially identical.

[18]The discharge slip stated: You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S. F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

On November 19, 1968 the Western Addition Community Organization filed a charge with the N.L.R.B. alleging that the Company had violated section 8(a)(1) of the Act by discharging Hollins and Hawkins. A complaint was issued and a hearing was held on April 8, 1969 before Trial Examiner William E. Spencer. He found that petitioners had engaged in "concerted activity" within the meaning of section 7 of the Act,[19] and that these actions had been based on a good faith belief that the Company was actually discriminating against racial minorities.[20] The Trial Examiner next examined whether these concerted activities lost their protection by virtue of the boycott appeal and the invective used against the Company. Though he criticized the language, and found "the potential for injury [to the Company] considerable,"[21] *he expressed no conclusion on this issue.* Finally, he examined the issue of whether the concerted activities lost their protection because they were "inconsistent with and disruptive of" the procedures for settling grievances under the collective bargaining agreement to such a degree that it "would not effectuate the policies of

[19]Section 7, 29 U.S.C. § 157 (1970), provides: Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[20]TXD at 10.

[21]*Id.* at 13.

the Act to extend its protection to such activities."[22] The Trial Examiner found that the activities were unprotected and recommended that the complaint be dismissed. He reasoned that to protect such conduct

> would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employee's duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement.[23]

The Board affirmed the rulings of the Trial Examiner, and adopted his findings, conclusions, and recommendations. Two members dissented.[24]

I.

Section 7 of the Act protects employees from discharge for engaging in protests against their employer's racially discriminatory practices. *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 4 (9th Cir. 1965); *Mason-Rust*, 179 NLRB 434 (1969); *Washington State Service Employees State Council No. 18*, 188 NLRB No. 141 (1970). Such protests in favor of non-

[22] *Id.* at 9.

[23] *Id.* at 15.

[24] Members Jenkins and Brown each filed dissenting opinions.

discriminatory working conditions are "concerted activities for the purpose of collective bargaining," within the meaning of that section. Extending the protection of section 7 to such protests is but one aspect of the national labor policy which unequivocally rejects racial discrimination in employment. *See, e.g., New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

Another aspect of national labor policy, and certainly a central tenet of the Act's structure, is set out in section 9(a) which provides that the representatives of the bargaining unit "shall be the exclusive representatives for all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (emphasis added).[25]

Recently, in *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) the Supreme Court underscored the purpose of the exclusivity principle enunciated in section 9(a):

[25] 29 U.S.C. § 159(a) provides in full:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." Steele v. Louisville & N.R. Co., 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term; and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionable at the center of our federal labor policy." "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 338.

388 U.S. at 180 (footnotes omitted). *See also, J.I. Case v. Labor Board,* 321 U.S. 332 (1944).

Similarly, the legislative history of section 9(a) emphasizes that the primary purpose of giving the elected representative the exclusive right to represent all members of the bargaining unit in discussions with the employer over working conditions was to prevent the situation where two or more agreements might be negotiated by splinter groups which treated various factions of the bargaining unit unequally. The House Report summarized the purposes of section 9(a) thusly:

> The underlying purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor orginzation negotiating the agreement, there would immediatedly result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

H.R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. at 20, in II *Legislative History of the National Labor*

Relations Act, 1935 (N.L.R.B. 1949) at 3069. Unequal treatment of members of the same bargaining unit could only produce bitterness, strife, and, ultimately, industrial instability—a prime target at which the Act was aimed, 29 U.S.C. § 151 (1970). Additionally, the cases have noted that the exclusivity of the bargaining representative helps to preserve an orderly procedure for collective bargaining by precluding the employer from bargaining with splinter groups. *Medo Photo Corp. v. N.L.R.B.,* 321 U.S. 678, 685 (1944).

These objectives of section 9(a) have been effectuated by provisions within the Act which restrict employers' conduct and case law which has restricted employees' conduct which interferes with that section. It is an unfair labor practice under sections 8(a)(1) and (5) of the Act for an employer to refuse to bargain with the duly elected union representative or to engage in bargaining with splinter groups. *Medo Photo Corp. v. N.L.R.B., supra.* Similarly, the rights protected by section 7, for employees to engage in concerted activity, have been held to be somewhat limited by section 9(a), though the boundaries of that limitation are by no means definite. The cases have not produced a uniform approach to determine when concerted activity by a minority of employees loses the protection of section 7 due to a conflict with the exclusivity of the bargaining representative provided by section 9(a). One approach has been to protect minority concerted activity, such as walkouts or picketing, whenever it is not in derogation of the union's

position on the matter in question, *i.e.,* when the concerted activity supports the position taken by the union. *See, e.g., N.L.R.B. v. R.C. Can Co.,* 328 F.2d 974 (5th Cir. 1964); *Western Contracting Corp. v. N.L.R.B.,* 322 F.2d 893 (10th Cir. 1963).[26]

Another approach, and now apparently more widely accepted, has been to find the minority concerted activity protected only when it is not disruptive of the concept of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position. *See, e.g., N.L.R.B. v. Tanner Motor Livery, Ltd.,* 419 F.2d 216 (9th Cir. 1969); *cf. N.L.R.B. v. Shop Rite Foods,* 430 F.2d 786 (5th Cir. 1970). In *Tanner, supra,* two employees were discharged for picketing their employer in protest over its racially discriminatory hiring practices. The two employees had not attempted to utilize their union representative to remedy the situation, and the union's position on their claims was not know (*sic*). Though the court agreed that such picketing was concerted activity within section 7, it found that section 9(a) deprived the picketing of the protection to which it would otherwise would have been entitled.

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[26] *See also,* First National Bank of Omaha v. N.L.R.B., 413 F.2d 921, 926 (8th Cir. 1969) (dictum); N.L.R.B. v. Rubber Rolls, Inc., 388 F.2d 71, 73 (3rd Cir. 1967) (dictum); Lee A. Consaul Co., 175 NLRB 547, 549 (1969), *enf. denied,* 469 F.2d 84 (9th Cir. 1972); Shop Rite Foods, Inc., 171 NLRB 1498, 1510 (1968), *modified,* 430 F.2d 786 (5th Cir. 1970); San Juan Lumber Co., 154 NLRB 1153, 1163 (1965), *enf'd.,* 367 F.2d 397 (9th Cir. 1966).

The decision in *R.C. Can, supra,* has come increasingly under attack. *See, e.g.,* Lee A. Consaul Co. v. N.L.R.B., 469 F.2d 84, 85 (9th Cir. 1972); N.L.R.B. v. Tannor Motor Livery, Ltd., 419 F.2d 216, 221 (1969); N.L.R.B. v. Shop Rite Foods, 430 F.2d 786, 790-91 (5th Cir. 1970).

The court specifically rejected the rationale of *R.C. Can, supra,* and reasoned that the concept of orderly collective bargaining could only be promoted if employees were held to have "an obligation to go to the union with their desire for non-discriminatory hiring."[27] An analogous position has been taken by a number of courts with respect to "wild cat" strikes which hold that such minority activity is so disruptive of collective bargaining that it can never be protected by section 7. *Lee A. Consaul Co. v. N.L.R.B.,* 469 F.2d 84 (9th Cir. 1972); *N.L.R.B. v. Sunbeam Lighting Co.,* 318 F.2d 661 (7th Cir. 1963); *Plasti-Line, Inc. v. N.L.R.B.,* 278 F.2d 482 (6th Cir. 1960); *Harnischfeger Corp. v. N.L.R.B.,* 207 F.2d 575 (7th Cir. 1953); *N.L.R.B. v. Draper Corp.,* 145 F2d 199 (4th Cir. 1944).

II.

With this brief discussion of section 9(a) and the cases interpreting the interplay between it and section 7, we examine the application of the exclusivity principle to the minority concerted activities in this case. We conclude that the Board's decision that these concerted activities were not protected by the Act is not supported by substantial evidence in the record and must be reversed. As our discussion below makes clear, we base this conclusion on the distinction between concerted activity involving racially discriminatory employment practices and concerted activity involving other working conditions, an analysis of the exclusivity principle, and the particular facts of this

[27] 419 F.2d at 221.

case. We recognize the important role played by the exclusivity principle in collective bargaining and feel that our decision here in no way hampers that role. In part III, *infra,* we note that on remand the Board may consider the issue of disloyalty.

A. *Concerted Activity Involving Racial Discrimination*

The right of an employee to racially non-discriminatory treatment is unquestionally (*sic*) a "condition of employment" and as such the negotiation of an anti-discrimination clause in a collective bargaining agreement is within the purview of the exclusive bargaining enunciated in section 9(a). Yet, this right to non-discriminatory treatment differs significantly from other "conditions of employment" which are also the subject of exclusive bargaining, such as pension benefits or seniority rights. The right to be free of racially discriminatory employment practices does not depend upon the presence of an anti-discrimination clause in a collective bargaining agreement, but is firmly rooted in the law. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.; United Packinghouse Workers Union v. N.L.R.B.,* 135 U.S. App. D.C. 111, 416 F.2d 1126, *cert. denied,* 396 U.S. 903 (1969). Even in the absence of such a clause in a collective bargaining agreement, an employer would be equally restrained from engaging in such practices.[28]

[28] Similarly, any analysis of whether concerted activity in protest over racial discrimination in employment was protected *vel non* in light of section 9(a) cannot turn on the fact that the collective bar-

Not only does concerted activity involving racial discrimination have a unique status in that the subject matter has independent statutory bases, but section 704(a) of Title VII precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices,[29] *Cf. Green v. McDonnell-Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *aff'd*, 41 *U.S.L.W.* 4651 (U.S., May 14, 1973). Where, as here, both the subject matter of the concerted activity and the right to engage in such activity are safeguarded by legislation, we feel such concerted activity cannot be treated identically with other concerted activity which is not so safeguarded for the purpose of determining whether it so violated section 9(a) as to loose section 7 protection.

Neither the Trial Examiner nor the Board took cognizance of the statutory bases of the rights involved in their evaluation of the undermining effect of these concerted activities to section 9 (a).[30] While these ac-

gaining agreement contained an anti-discrimination clause. *See* N.L.R.B. v. Tanner Motor Livery, Ltd., 419 F.2d 216, 221 (9th Cir. 1969). We assume that even in the absence of such a clause, section 7 activity would be equally restrained by section 9(a)—whatever the extent of that limitation might be.

[29]42 U.S.C. § 2000e-3(a) (1970) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[30]Both dissenting members criticized the Board for not considering the legislative policies embodied in Title VII. 192 NLRB No. 19 at 17, 23.

tivities are the subject of review by the Board only because they are deemed to be "concerted activities" within section 7 and also involving "conditions of employment" within section 9 (a), the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, co-existing and perhaps inconsistent policies embodied in other legislation. As the Supreme Court noted in *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also, Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-58 (1958); *cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944)[31]; *Northern Natural*

[31]*In McLean Trucking Co., supra*, the Supreme Court stated:

> To secure the continuous, close and informed supervision which enforcement of legislative mandate frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the

Gas Co. v. F. I. C., 130 U.S. App. D.C. 220, 226-28, 399 F.2d 953, 959-61 (1963).

Thus, the Board should have recognized that in light of Title VII, concerted activity involving racial discrimination is quite distinct from other concerted activity.

B. *Interference with Section 9(a)*

As we noted previously,[32] the exclusivity principle enunciated in section 9(a) of the Act was premised on the concept of majority rule. This concept—that what was best for the union was best for the individual—recognized that collective bargaining could not proceed where various factions within the bargaining unit were free to present conflicting or unequal demands to the employer. Subjection of the will of the individual to the will of the majority was the method Congress chose to preserve industrial peace and stability over matters in which individuals would most likely dis-

immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. National Broadcasting Co. v. United States, 319 U.S. 190; New York Central Securities Corp. v. United States, 287 U.S. 12.

321 U.S. at 79-80 (emphasis added).

[32] *See* part 1, *supra*.

agree. However, on the issue of whether to tolerate racial discrimination in employment the individuals in a union cannot legally disagree. The law does not give the union an option to tolerate *some* racial discrimination, but declares that *all* racial discrimination in employment is illegal. 42 U.S.C. § 2000e-2 (1970).[33] Therefore, the underlying premise of section 9(a) that the will of the individual must be subjected to the will of the majority does not authorize the approval of racially discriminatory employment practices, because the purposes of the minority group and the union in desiring to eradicate racial discrimination in employment cannot be at odds. Accordingly, concerted activity involving racial discrimination involves other factors than the major premise that underlies section 9(a).

While concerted activity over actual racial discrimination differs significantly from concerted activity over other working conditions and does not defeat the underlying premise of section 9(a), nonetheless we recognize that such activity as was engaged in here

[33] 42 U.S.C. §2000e-2(a) (1970) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

does interfere to a certain extent with the collective bargaining process. In abandoning the grievance procedures and seeking to bargain[34] on their own, the picketers here rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement.[35] We cannot agree with the Board, however, that this limited interference *alone* is sufficient to remove these concerted activities here from the protection of the Act.

First, we note that petitioners did not immediately proceed to settle their dispute with the Company over racial discrimination on their own, but utilized the procedures provided by the collective bargaining agreement for several months. Thus, the situation was quite different, and less disruptive of collective bargaining, than the one confronted by the Ninth Circuit in *Tanner, supra,* where no attempt had been made to utilize the union representative or the contract procedures before engaging in minority concerted activity. We agree with *Tanner* that even when racial issues are at stake, one should be required to submit such disputes first to the union before one resorts to minority concerted activity.[36]

[34]Petitioners argue that they only wanted to "talk" with the Company's president and "discuss" the situation. They dispute the Trial Examiner's finding that Hawkins and Hollins activities were "no mere presentation of a grievance, but nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees." TXD at 14. However, we can see no reason to disturb this finding.

[35]We can find nothing in the collective bargaining agreement that would have prevented the Union from proceeding on a class basis, representing all minority employees, but the method of procedure would have still required essentially the presentation of evidence with respect to individual employees.

Without such a requirement, parties aggrieved by racially discriminatory employment practices would have little incentive to use the grievance procedures in the agreement, and certainly national labor policy favors the use of grievance-arbitration procedures to settle labor disputes, *see, e.g., Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235, 242-43 (1970), even when they involve racial discrimination. Though the exact role of grievance-arbitration procedures in enforcing rights created by Title VII is presently the subject of considerable dispute: *see Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. CHI. L. REV. 30 (1971), we think grievance-arbitration procedures can play an important role in remedying racial discrimination in employment and should be encouraged. *See, e.g., Hutchings v. U.S. Industries,* 428 F.2d 303, 309 (5th Cir. 1970).[37]

Second, we find it significant that the Union and the petitioners were *not* working at cross-purposes,

[36]We note that an employee has not been required to resort to contract grievance procedures, however, before maintaining a Title VII action. Parmer v. Nat. Cash Register Co., 346 F.Supp. 1043, 1049 (S.D. Ohio 1972); Evans v. Local Union 2127, 313 F. Supp. 1354, 1358 (N.D. Ga. 1969); Bremer v. St. Louis S. W. R. R., 310 F. Supp. 1333, 1337-38 (E.D. Mo. 1969); King v. Georgia Power, 295 F. Supp. 948 (N.D. Ga. 1968).

[37]*See also, Gould, Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U.PA.L.REV. 40 (1969).

but were both attempting to eradicate racially discriminatory employment practices.[38]

There was no disruption of orderly collective bargaining in the sense that a minority of employees were not attempting here to speak for the majority as in the case where a minority group engages in a "wildcat" strike during company-union negotiations in an attempt to express a rejection of a company offer. *See, e.g., N.L.R.B. v. Sunbeam Lighting Co.,* 318 F.2d 661 (7th Cir. 1963). Third, we note that after pursuing their grievances on an individual basis for several months, petitioners asked their elected representative to proceed on a "group" basis,[39] *i.e.,* to represent all minority employees affected by the alleged discrimination. The Union declined to change its pending complaint to proceed on a "group" basis. At this point petitioners abandoned the pending grievance procedure which had been initiated on their behalf and engaged in concerted activity allegedly on behalf of all minority employees. We think these facts indicate that though the immediate adjustment board proceedings were disrupted, this disruption cannot wholly destroy the protection afforded these employees by section 7, especially in light of the express protection mandated by Title VII and the limited interference with section 9(a).

[38]Indeed, if the Union were not working to eradicate racially discriminatory employment practices, it would not only be violating its statutory duty of fair representation, Vaca v. Sipes, 386 U.S. 171, 182 (1967), but also committing an unfair labor practice, *see, e.g.,* Local 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

[39]*See* note 12, *supra.*

There is nothing in the record before us to indicate that the union's decision to remedy the charges of discrimination by proceeding on an individual rather than a group or class basis was made in bad faith.[40] The union may well have thought it had chosen the most efficacious method to handle the charges, and it may have done so. Nonetheless, it might be that these charges could have been handled on a group or class basis. Had the union's decision to process only individual grievances been made to delay the ultimate eradication of discrimination, or been motivated by similar bad faith considerations, clearly it would have breached its duty of fair representation of all of its members. *See, e.g., Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944). Under such circumstances a union's decision to proceed on an individual basis could not, in our view, prevent a minority from attempting to proceed by means of another alternative method. Yet, even where the might be no bad faith on the part of the union, we recog-

[40]The record contains a number of uncontradicted references to the fact that the union was proceeding on an individual basis. However, it also appears that the union charged the employer with "racial discrimination" and alleged broad violations in the April 11, 1968 Report (General Counsel Ex. 7, Tr. 190-194). Thus, regardless of the nomenclature used, it may well be that the union was bringing all the charges that were supported by evidence. Whether this constituted proceeding on an individual basis or some other broader basis is impossible for us to determine. We recognize that a "group" action must necessarily depend upon a number of individual cases. The important consideration is not how the proceeding might be characterized but whether the union is proceeding against *all* discrimination.

nize that the method chosen by a union might not be the most efficacious or expedient.

For example, the union might be vigorously processing individual grievances before an adjustment board, while it would be more efficient and thus preferable for it to be attempting to engage in collective bargaining negotiations with the employer for all minorities to eliminate all the discriminatory employment practices. In such a case, we do not think the method or means chosen by the union should preclude a minority group who have reasonable grounds for believing that the union is not proceeding against all discrimination from attempting to assert their claim of racial discrimination in a manner which they consider would be more successful. Otherwise, as Member Jenkins observed in dissent, a union "would [be] permit[ted] . . . to control the scope, direction, pace and degree of racial discrimination."[41] We agree that the eradication of racial discrimination in employment cannot be subjected to such a restriction. Thus, the Labor Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means.* Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its section 7 protection.

The Trial Examiner reasoned that orderly collective bargaining would be undermined by protecting

[41]192 NLRB No. 19, slip op. at 11.

this concerted activity because it would impose upon the Company "an unreasonable burden" of having to bargain with appellants while, at the same time, dealing with the Union representative in the grievance procedure.[42] Certainly collective bargaining must be orderly in the sense that no stable, meaningful agreement can be reached where various factions are free to make conflicting demands upon an employer. The avoidance of such a state of affairs, as we have noted, was the prime motivation behind the exclusivity principle of section 9(a).[43] We can see nothing in that principle, however, which indicates that it was intended to be used as a shield to protect an employer from the "burden" of having to deal with two groups on the same subject. We cannot agree that any inconvenience which the Company might experience in being required to bargain with the minority here while still participating in the grievance procedures justifies withdrawing section 7 protection from these concerted activities.

III.

On remand the Board may consider the issue of whether the picketing of these employees, considering the language used, was so disloyal to their employer as to remove them from the protection of section 7. *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard),* 346 U.S. 464 (1953). Neither the Board nor the Trial Examiner decided this issue, though the

[42]TXD at 15.

[43]See pp. 8-11, *supra.*

latter discussed it at considerable length.[44] While we do not express any opinion on the merits of this issue, we note that in considering it on remand the Board should closely examine the facts to ensure that neither racial discrimination nor adversity toward these concerted activities motivated the Company in its decision to discharge the employees. As the Supreme Court observed in *Jefferson Standard, supra:*

> The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge.

346 U.S. at 475. Such a factual determination is especially important here because any discharge which was racially motivated would be an unfair labor practice, *United Packinghouse Workers Union v. N.L.R.B.,* 135 U.S. App. D.C. 111, 416 F.2d 1126, cert. denied, 396 U.S. 903 (1969); moreover any discharge due solely to the employer's objection against lawfully protesting his allegedly discriminatory employment practices would be unlawful. *N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (9th Cir. 1965).[45]

[44]TXD at 11-13.

[45]Title VII also recognizes that an employee may be properly discharged for engaging in disloyal conduct, if that is the real cause of the discharge. However, the discharge would be unlawful, and the employee subject to reinstatement, if it were due to the fact that the employee had opposed certain employment practices

For these reasons the decision and order of the Board are reversed and remanded to the Board for further proceedings consistent with the opinion.

Judgment accordingly.

WYZANSKI, *Senior District Judge,* dissenting: I regret my view of the facts and the law differ in some respects from my brethren's excellent opinion. As I

made illegal by Title VII. 42 U.S.C.A. § 2000e-5(g) (1972 Supp.) provides:

> (g) if the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay. If such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged *for any reason other than discrimination* on account of race, color, religion, sex, or national origin or in violation of section 2000-3(a) of this title (Emphasis added.)

Section 2000e-3(a) provides:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor

see it, we have enough to decide unequivocally the question whether the NLRB properly concluded that the Emporium Capwell Co. did not violate Section 8(a)(1) of the National Labor Relations Act when it discharged employees James Joseph Hollins and Tom Hawkins.

This case is before the Court on the petition of the Western Addition Community Organization (hereinafter referred to as the Petitioner") to review an order of the National Labor Relations Board, issued July 22, 1971, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), dismissing a complaint issued against The Emporium Capwell Co. (hereinafter referred to as the "Company"). The Board's Decision and Order is reported at 192 NLRB No. 19. This Court has jurisdiction under Section 10(f) of the Act.

Tom Hawkins and James Joseph Hollins were employees of the company from June 1966, and November 1967, respectively, until their discharge on November 11, 1968. The Company is engaged in the operation of a retail department store at 835 Market Street, San Francisco, California. At all material

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organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

times the Company was a member of a multi-employer group, the Retailer's Council, which served as its bargaining agent, and, as such, was signatory to a collective bargaining agreement with the Department Store Employees Union (hereinafter the "Union") which was the exclusive representative of the Company's employees employed in the stock and marking areas at the store. The applicable collective bargaining agreement provided, inter alia:

> Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex.
>
> * * *
>
> Section 5(B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and permissive within this agreement."

The agreement also provided that if, after considering a submitted issue for one week, the Board was unable to reach a settlement, either party could insist upon binding arbitration. Also, the agreement contained no-strike and no-lockout clauses.

In a series of meetings in early April 1963, a group of Company employees, including Hawkins and Hollins, submitted to Union representatives a list of grievances in which the employees contended that the Company was discriminating against racial minorities. Claiming that racial bias had caused minority em-

ployees to be denied promotions, the employees specifically charged that employee Russel Young had been denied advancement solely because he is black. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a union committee to investigate the allegations, and later that month prepared a detailed report outlining the employees' contentions which stated, *inter alia:*

> Probably, the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

Shortly thereafter, Johnson presented his report to the Retailers Council, where it was agreed that the grievances should be taken directly to the Company. Accordingly, in mid-April, Johnson met with Company labor relations manager Paul Ehrenfried and it was agreed that the Company "would look into" the situation and "see what they could do."

In May, a group of ten employees requested an additional meeting with Johnson. The problem of racial discrimination in general and the Russel Young case in particular were again discussed; however, since Young was about to begin his summer vacation, it was agreed that further investigation of the matter should await his return. On about September 3, Johnson again met with the employees, including Hawkins and Hollins, and with representatives of the Fair

Employment Practices Committee ("FEPC") and the local Economic Opportunity Council ("EOC"), and announced that the Union had considered the problem and had concluded that the Company had been acting discriminatorily, and that, in accordance with its contract with the Retailers Council, the Union would demand an Adjustment Board proceeding and would insist upon arbitration if necessary. While acknowledging that arbitration was a time-consuming procedure, Johnson pointed out that the arbitration award, once achieved, would produce a "long lasting effect" which would benefit not only the employees having immediate interest in the problem, but "other people involved in it" as well. As he explained at the hearing:

> [W]e wanted to process these grievances and we felt that there were problems of discrimination and it was my own personal feeling that all the discriminatory acts should be processed and that we ought to follow through and take care of it.
>
> * * *
>
> [I]t was my feeling certain acts had to take place in order that everybody at the Emporium would have an opportunity not only to have a job, but to advance into new positions.
>
> * * *
>
> I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question.
>
> * * *

> I came to the conclusion after the meeting we had in April that there was a serious situation that developed and it had to be taken care of.

However, the program outlined by Johnson did not satisfy all of the employees; thus, some of those present expressed "frustration" with the situation and proposed that the Union picket the Company's store. Johnson rejected the idea and in an exchange with Hollins explained that the Union was bound to seek satisfaction of grievances according to the terms of its contract and thus could not engage in "dramatic" protests such as boycotts. Johnson further stated that while individual employees "could take whatever action they wanted so long as it was legal," it was the Union's advice that they follow an "orderly legal procedure." The EOC and FEPC representatives supported Johnson's position.

The next day, Johnson wrote Vincent Brown, general manager of the Retailer's Council, requesting a meeting of the Adjustment Board to resolve the grievances discussed at the previous day's meeting, asserting, *inter alia:*

> We specifically charge the Emporium with violations of Section 5(B) and 21(E) of the Agreement between the San Francisco Retailers Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.
>
> We are ready to proceed to immediate arbitration if the Emporium is ready.
>
> * * *

In response to this letter, a meeting of the Adjustment Board was convened on October 16. Accordingly, the Union in consultation with counsel prepared its position for presentation to the Board.

As the meeting began, Union Agent Williams attempted to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins who, acting as spokesman for himself and employees Hawkins, Epps and Washington, read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis and stating that these four employees would not "speak as individuals," but would act only "as a group." Further, Hollins stated that the group "wanted to talk to the President of the Emporium and wouldn't talk to anybody else," since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium." Then, after refusing to give any testimony regarding individual employees' complaints, Hollins, Hawkins, Epps, and Washington walked out of the meeting.

A second meeting of the Adjustment Board was held on October 18, but none of the group of four attended. The record is unclear as to what transpired at the meeting; however, Hawkins did acknowledge in his testimony at the hearing in this case that through the Union's intervention, Russel Young was promoted to the position of First Assistant Manager, and Fata, another employee, was also promoted to a supervisory position.

Thereafter, in accordance with the group's stated intentions, Hollins went to Company President Batchelder insisting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store." Batchelder would not speak with Hollins but suggested that Hollins discuss the situation with Henderson, the Company's personnel director. Hollins refused.

On October 22, Hawkins and Hollins, together with several other employees, called a press conference at the Sun-Reporter Building in San Francisco which was attended by representatives of the press, radio, and television. The employees stated that the Emporium was engaging in racist conduct by discriminating against racial minorities and that the employees were planning to picket the store. Hollins also read the contents of a handbill which the group intended to distribute to the public (see below) and stated that their objective was "to try to talk to the top management to get better conditions for the Emporium."

Then, on the following Saturday, November 2, employees Hollins, Hawkins, Epps and Washington picketed the store from 9:30 a.m. to 6 p.m., distributing the following handbill to people entering or leaving the store:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

For years at the Emporium black, brown, yellow, and red people, have worked at the lowest jobs, at the lowest levels. Time and again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at the Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium.

We welcome the support of our brothers and sisters from the churches, union, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

While the picketing was in progress, Johnson told Hollins that he did not want to see him fired and that the only way to resolve the matter was through arbitration. Hollins ignored Johnson's suggestion and again stated that "the only one they wanted to talk to was Mr. Batchelder."

On November 7, Hollins and Hawkins were called to the office of Paul Ehrenfried, manager of labor relations, and given a formal written warning which

stated as follows with respect to the press conference of October 22 and the handbill of November 2:

> These statements are untrue and are intended to and will if continued injure the reputation of the Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.
>
> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statements.

Nevertheless, on the following Saturday, November 9, Hollins and Hawkins again picketed the Emporium and distributed leaflets substantially identical with those distributed the previous week.

Accordingly, on Monday, November 11, Hollins and Hawkins were called to Ehrenfried's office and were discharged. Each was given a discharge slip which bore the notation:

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

The Union subsequently filed a protest with the Retailer's Council on the discharge of Hawkins and Hollins.

November 19, 1968 Western Addition Community Organization, acting for Hawkins and Hollins, filed with the NLRB a charge that Emporium had violated

the NLR Act by discharging them for engaging in statutorily-protected concerted activities, and that those discharges constituted unfair labor practices within the meaning of Section 8 (a) (1) of the Act. The NLRB issued a complaint. After hearing before an NLRB Trial Examiner, he recommended dismissal of the complaint. On review, the Board dismissed the complaint, solely on the ground that the activities of Hollins and Hawkins were not protected because they were in derogation of the right of exclusivity of representation conferred upon the union by Sections 8 and 9 of the Act. That dismissal is the subject of the petition filed in this court by Western Addition Community Organization.

Essentially the question here preserved is whether after the employees in a collective bargaining unit have selected a representative in accordance with § 9 of the NLR Act those in a minority are free to bargain with their employer concerning class conditions of alleged racial discrimination within that unit. As the ensuing discussion indicates, attempts to avoid the direct thrust of that issue seem to be, in at least this case, exercises in futility or postponement. The essential question cannot be properly evaded or escaped by pretending that here we are dealing with individual grievances of single employees rather than working conditions of a group of employees, or that here we have a minority of employees who are not acting in derogation of the authority of their union representative. What this case requires this court to face is whether, in the light of the special aspects of

the problem of potential racial discrimination, to which both the generalities of the United States Constitution and the specifics of such Civil Rights Acts as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. are addressed, there is created an exception to the usual rule of exclusivity of bargaining rights conferred by the NLR Act upon a union selected by a majority of employees in an appropriate unit. This initially presents a matter of statutory construction of the NLR Act, although, if that is not resolved favorably to the petitioner, there lurks in the background a possible question as to whether insofar as it purports to give the representative selected by a majority a power to stand athwart a minority's claim to the right to seek racial nondiscriminatory conditions, the NLR Act violates the Fifth, Thirteenth, and Fifteenth Amendments to the United States Constitution, inasmuch as then the Act might be regarded as perpetuaring (*sic*) the consequences of slavery, buttressing racial discrimination, and denying due process of law.

In the case at bar the facts as viewed by the NLRB make it plain that Hollins and Hawkins sought to present to the management of Emporium not their personal grievances, such as their individual failure to be accorded their due under the collective bargaining agreement, or such as the adjustment of some wholly individual complaint. What those two men wanted was a change in management's policies in promoting, hiring, and otherwise treating that class of workers within the unit who were not white in

color. Cf. *NLRB v. Tanner Motor Livery, Ltd.*, 9th Cir., 1969, 419 F. 216, 218; *Brown v. Sterling Aluminum Products Corp.*, 8th Cir., 1966, 365 F. 2d 651, 657. There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances.

Nor can it validly be claimed that on this record Hollins and Hawkins were not acting in derogation of the union representative selected by a majority, but rather were acting to supplement, support, and make more explicit the application of the bargaining contract theretofore negotiated by that union representative. To be sure, the contract, theretofore negotiated, provided that the employer should not discriminate racially. However, fairly construed, that glittering generality was, according to the contract, to be vindicated, if necessary, by a procedure of specific complaints made by the union representative and by him presented through the grievance and arbitral machinery. This the union clearly saw, and its officials were themselves quite unwilling to press for any broad assault on the employer to concede on some group basis that it should adopt a different policy of promoting or hiring colored persons. While there is a shade of ambiguity as to the union's attitude toward having such an assault made by Hollins and Hawkins, the union neither welcomed nor encouraged the steps Hollins and Hawkins took to get the employer to change its policies. It may be that the record does not show that the union interposed a firm veto. Yet we are not so unsophisticated as not to

appreciate why this evidence is not and probably never would be available. We recognize that the union could have reasons which it might not choose to proclaim from the housetops why it did not want anything approaching what it might regard as a policy of employment based on affirmative measures to achieve racial balance. Whether Hollins and Hawkins had as ultimate goals affirmative quotas for blacks, or some method of achieving in the Emporium store a racial balance corresponding to the racial balance provided by judicial decrees as a remedy in certain public employment and in certain school cases, it is no secret that what was here sought would be in derogation of the union in at least two ways. In the most obvious way it would represent a political victory for Hollins and Hawkins which would certainly not add to, and almost surely would detract from, the political appeal of the present union officers at the next election of representatives by the employees in the relevant unit; and which, long before the election, would detract from the union's glamor. More important, if Hollins and Hawkins succeed in their efforts to have the employer change its policies some whites now employed and others who might be employed will be potential losers. If a black man is promoted or hired, it is inevitable that a white will not be promoted or hired for the same job. Thus Hollins and Hawkins are acting in derogation of the union, its contract, and many of its members.

Yet this case is not to be disposed of merely by uncovering its bare bones and ripping off the veils

in which it has been wrapped that is, the pretense that this is not an effort to change working conditions in the unit, and the further pretense that this effort is not in derogation of the representative selected by a majority in accordance with Section 9 of the NLR Act. We must recognize that this is not, except most superficially, analogous to a case wherein a minority within an appropriate unit seeks, without the consent of the representative selected by a majority, to get different wages, (See Archibald Cox, *The Right To Engage In Concerted Activities,* (1951) 26 Indiana Law Journal 320), or seeks to reach agreement more quickly than the representative has done, (Cf. *NLRB v. Draper Corp.,* 4th Cir., 1944, 145 F. 2d 199, 156 A. L. R. 989; *NLRB v. Sunset Minerals, Inc.,* 9th Cir., 1954, 211 F. 2d 324,) or seeks the same results with the acquiesence (*sic*), expressed or implied, of the representative selected by the majority, (Cf. *NLRB v. R. C. Can Co.,* 5th Cir., 1964, 32 F. 2d 974-978-979), or, let us say, purely hypothetically, seeks to get better working conditions for members of a fraternal organization, or quicker promotion for workers who have been graduated from institutions of advanced education, or even claims that skilled workers in the union ought to be differently treated from unskilled workers. See William B. Gould; *The Status of Unauthorized And 'Wildcat' Strikes Under The National Labor Relations Act* (1967) 52 Cornell L. Q. 672, 686.

What this case involves is a racial issue. Racial issues in our society are, because of the United States Constitution, because of the history, traditions and

aspirations of our people, and because of the legislation of Congress, most particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., in quite a different category from other issues presented by a minority in a unit which has selected a representative in accordance with § 9 of the Act.

A first, and by no means trivial, reason why the employer, the union, the NLR Board, and we are required to treat differently a complaint as to a working condition with racial character is that, as shown by Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000(e) et seq., and by cases such as *Griggs v. Duke Power Co.* 1971, 401 U.S. 424, it is part of our national policy, declared in Acts of Congress, not merely that an employer shall avoid the prejudice inherent in discriminating negatively by refusing to hire or promote black persons, but that an employer shall take affirmative steps to assure that black persons have equality of opportunity for employment and promotions. See *Castro v. Beecher,* D. Mass. 1971, 334 F.Supp. 930, aff'd. with modifications by 1st Cir., 1972, 459 F. 2d 725, and particularly the opinions of the District Court on remand, April 15, 1973. The NLR Act contemplates that the NLRB and all others concerned with the Act shall enforce that policy together with the policy of non-discrimination against employees on account of their legitimate union activities. This is the fair implication of *Southern Steamship Co. v. NLRB,* 1942, 316 U.S. 311.

There is a second and more subtle reason why a racial complaint must be looked upon differently from

the run-of-the-mill complaints made by minorities as to everything from wages to drinking fountains. When the minority consists of non-whites who seek for themselves what they regard as equality of opportunity, it is to be expected that their position is, if not hostile to, or at least uncongenial to, certainly not fully shared by, a majority of whites in the same unit. Even if we assume that the whites are tolerant nay generous, their short-term interest is in conflict with the short-term interest of the non-whites. Nothing—except perhaps a philosophy founded upon long-term interests—can eliminate that basic conflict. Hence it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues, whether or not this is in disparagement of the rights of the union representative. See John Rawls, *A Theory of Justice,* Harvard University Press (1971) pp. 228-234; Sir Isaiah Berlin, *Two Concepts of Liberty,* Oxford University Clerendon Press (1958), pp. 9-14, 48-57.

This inevitable conflict makes it necessary either to construe legislation so as to avoid an obvious injustice, or, in the last resort, if such construction is not permissible, to face up to the ultimate Constitutional question in the spirit so perceptively adumbrated in the now classic fourth footnote in *U. S. v. Carolene Products Co.,* 1938, 304 U.S. 144, 152-153.

Fortunately, here there is no insuperable difficulty in construing the NLR Act to permit a minority, (despite the previous selection by a majority of a

representative of the unit in which the minority is employed, and despite a collective bargain executed by that representative and the employer) to bargain directly with the employer in regard to racial issues which affect that minority in a way different from the way they affect the majority. A meticulous reading of the history of the NLR Act makes this point evident. When, as Solicitor General, the Honorable Stanley Reed argued before the Supreme Court that the NLR Act was constitutional, he sought to explain the object of giving exclusivity to the representative. See 75th Cong., 1st Sess., Senate Document No. 52, Arguments In The Cases Arising Under The Railway Labor Act And The National Labor Relations Act Before The Supreme Court of The United States, February 8-11, 1937, pp. 37-38. He had made the same point, somewhat more precisely, earlier in the week in footnote 35a in the brief he had filed in *The Virginian Railway Co. v. System Federation No. 40,* 1937, 300 U.S. 515, 536-537, a companion case involving the cognate Railway Labor Act. What Mr. Reed's brief said, Mr. Justice Stone's opinion in *The Virginian Railway* case, just cited, incorporated with great specificity into the Railway Labor Act. See 300 U.S. 548, footnote 6, and Mr. Chief Justice Hughes' opinion in *National Labor Relations Board v. Jones & Laughlin Co.,* 1937, 301 U.S. 1, 44 incorporated with somewhat more generality into the National Labor Relations Act.

What is undeniable (as the discerning opinion of Circuit Judge John R. Brown in *NLRB v. R. C. Can*

Co., 1964, 328 F. 2d, 974, 979, joined in by Circuit Judge Elmer Tuttle, emphasizes, and as *Vaca v. Sipes,* 1967, 386 U.S. 171 and Note *Individual Control Over Personal Grievances under Vaca v. Sipes,* 77 Yale L. J. 559 (1968) seem to recognize) is that the draftsmen of the NLR Act, those who championed it in argument before the Supreme Court, and that court itself had their focus on the chaos that would occur, the breakdown of the union's authority, the unfortunate predicament of an harassed employer, and the likely breach of industrial peace which would occur if every dissident group of workers in an appropriate unit was free to negotiate all the terms of its own working conditions with the employer. However, one associated with the original Wagner Act cases or the legislative debates preceding the adoption of the NLR Act had his attention called to a racial or kindred term of employment where it was *inevitable* that the interests of the representative and of the majority would be adverse to a statutorily-, not to say, constitutionally-, protected claim of a minority or dissident group or individual. See *Donnelly v. United Fruit Co.,* N. J. 1963, 190 A. 2d 835; Hain, *Black Workers Versus White Unions etc.,* 16 Wayne L. Rev. 37 (1969).

Verbally, and from one set of premises one may say "logically" as well, the reasoning which precludes a minority from bargaining about wages or normal working conditions also precludes the minority from bargaining about racial discrimination. But that argument proceeds from an implied premise that

Congress when it used the all-inclusive language of exclusivity set forth in Sections 8 and 9 of the NLR Act really meant to be all-inclusive. The plain fact of the matter is that there is not a shred of evidence to show that the draftsmen of the Act, its sponsors, the legislators who enacted it, the President who signed it, the lawyers who argued for it, or the Justices who sustained it ever contemplated the issue presented in the case at bar: whether the NLR Act gives to a white majority the power to foreclose a non-white minority from presenting to their employer those special issues which arise with respect to the employment of non-whites. It cannot fairly be supposed that by implication, or by the use of general language of an admittedly comprehensive nature, Congress intended to deny the non-whites what thoughtful persons must concede is elementary justice.

To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy. Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society even if, which is probably at least the short-term consequence, the result is that industrial peace is temporarily adversely affected. In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.

Inasmuch as the NLR Act lends itself to a construction which avoids the denial of elementary

justice it is unnecessary for this court to consider whether if the statute did deny the non-white minority the right to present issues which have a non-white hue, the NLR Act as applied to the minority would be repugnant to the Fifth, Thirteenth, or Fifteenth Amendments to the United States Constitution.

Some miscellaneous points should be answered before concluding.

There is, of course, no question that the issues tendered by Hawkins and Hollins related to "working conditions" as that term is used in Sections 7, 8, 9, and other parts of the NLR Act.

Therefore, unless the "exclusivity" doctrine stood in the way, Hawkins and Hollins had a statutorily-protected right to picket in order to present their claim with respect to alleged discrimination against non-whites. This was indeed specifically recognized by the Court of Appeals for the Ninth Circuit in the first stage of *NLRB v. Tanner Motor LTD.*, 9th Cir., 1965, 349 F.2d 1, although, of course, in the second stage of the same case, *NLRB v. Tanner Motor LTD,* 9th Cir., 1969, 419 F.2d 216, the Ninth Circuit has reached a conclusion diametrically opposed to the one set forth in this opinion.

In this case there is not properly before us as a Court of Appeals any question as to whether the language, signs, and like utterances by Hawkins, Hollins, and their associates were such as to deprive them of a statutory privilege against discriminatory action by their employer. The NLRB itself, (though not its trial

examiner) refrained from any comment on those utterances, The Board, in short, did not refuse to issue a complaint against Emporium on any ground related to the utterances of Hawkins and Hollins. We are, therefore, not called upon to decide whether we think such utterances fall within the doctrines of *NLRB v. Local Union No. 1229,* 1953, 346 U.S. 464, 472 and *Patterson Sargent Co.,* 1956, 115 NLRB 1627, 38 LRRM 1134.

Certainly the Board was warranted in not placing petitioner beyond the pale of legal relief merely because the vulgar language and the want of "company loyalty" of Hawkins and Hollins, and their disregard of the truth were offensive. See *Dobbs Houses v. NLRB,* 4th Cir., 1963, 325 F.2d 531, and *Crown Central Petroleum Corp. v. NLRB,* 5th Cir., 1970, 430 F.2d 724, 731.

For judges to make a ruling upon the effect of language and conduct which in its opinion the NLRB did not characterize and rule be either permissible or impermissible would be to arrogate unto ourselves a preliminary fact-finding and law-determining function which Congress has entrusted to the Board and not to our non-expert hands. Nothing said herein, however, is to be construed as indicating approval of the vulgarities and exaggeration in the utterance of Hawkins, Hollins and their fellows are. To be sure, those who use such Billingsgate are not on that account to be denied legal relief. Nonetheless, it is fitting for the court to remind those represented by petitioner that their interests, as well as the interests

of the employer and, more important, of democratic society favor rational discussion, and not abusive intemperate name-calling. Those who seek an understanding tolerance would do well to practice it.

In my view, the NLRB's order should be set aside, and the Board be directed to take further proceedings in conformity with this opinion. I see nothing to be gained by a broad as distinguished from a narrow, directory remand unequivocally commanding the NLRB to grant the relief sought by the complaint. I see no possible way of avoiding the head-on challenge to the exclusivity principle which is involved in the uncontrovertible facts. Justice delayed is justice denied.

United States of America
Before the National Labor Relations Board

Case 20—CA—5304

The Emporium and Western Addition Community Organization

[Filed July 23, 1971]

DECISION AND ORDER

On October 20, 1969, Trial Examiner William E. Spencer issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision together with supporting briefs, and Respondent filed cross-exceptions to the Trial Examiner's Decision and in opposition to the General Counsel's exceptions together with a supporting brief.[1]

[1] *Amici curiae* briefs were filed by the Department Store Employees Union Local 1100, Retail Clerks International Association, AFL-CIO, the National Association for the Advancement of Colored People, and the Equal Employment Opportunity Commission. Respondent also filed a brief in reply to the *amici* briefs.

On December 14, 1970, the National Labor Relations Board having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, notified the parties that oral argument on the case would be heard by the Board on January 4, 1971. All parties participated in the oral argument which was subsequently held on the aforesaid date.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions,[2] and recommendations of the Trial Examiner.

[2] Unlike our dissenting colleague, Member Jenkins, we conclude that the record before us neither requires nor allows findings as to two matters which were not alleged or litigated but which, nevertheless, are assumed as facts and supply the foundation of his dissent, specifically: (1) that Respondent was engaged in a pattern or practice of racial discrimination, and (2) that the Union's efforts to remedy that supposed discrimination were so limited that the Union breached its duty of fair representation, and should forfeit its status as the exclusive representative of employees in the bargaining unit. Furthermore, since those issues were not litigated, any factual findings with respect to them could not properly be made upon this record. Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected because in derogation of the duly designated exclusive bargaining representative. For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., July 22, 1971.

Edward B. Miller, Chairman
(Seal) John H. Fanning, Member
Ralph E. Kennedy, Member
National Labor Relations Board

Member JENKINS, dissenting:

Respondent, The Emporium, operates a department store in the San Francisco area. It has a collective-bargaining agreement with the Union, containing a clause prohibiting racial discrimination. Respondent discharged two Black employees for orderly picketing and leafletting of Respondent's store in protest of alleged racial discrimination respecting promotions and other terms and conditions of employment.

Over 6 months before the picketing and leafletting began, the Union had alleged The Emporium had violated the nondiscrimination clause, and had sought to pursue individual cases of alleged discrimination through the grievance and arbitration procedure established by the collective-bargaining agreement. Some employees, including those discharged, considered that the alleged discrimination problem affected all black,

brown, yellow, and red employees. They objected to the Union's limiting grievances to individual cases as being too slow, narrow, and ineffective as a remedy, and asked the Union to seek grievance adjustment, and arbitration if necessary, of the broad question of all phases of discriminatory treatment of all Black and other minority employees. The Union declined, and the picketing and leafletting resulted.

The question thus presented is whether concerted activity by employees protesting the existence of all forms of alleged racial discrimination loses its protection under the Act because the Union representing the employees has taken a position in support of eliminating some, but not all, phases of the alleged discrimination.[3]

The Trial Examiner found that the picketing and leafletting lost its protection, primarily for two reasons: (1) The Union is the exclusive representative of the employees under the Act; the Act entitles the Employer to deal only with the Union rather than bargain on two fronts; thus the picketing and leaf-

[3]It will be noted, contrary to the statement in fn. 2 of the majority opinion, that I have set forth the facts as involving "alleged" discrimination, and have refrained from any indication of the merit (or lack of it) in the protesting employees' assertions that Respondent engaged in racial discrimination. If the employees were of the opinion that such discrimination existed, and protested, this suffices (in the absence of additional factors such as those subsequently considered in the text) to make their activities concerted and concerned with terms and conditions of their employment, and thus brings such activities within the protection of Section 7. It is on this principle, and on these facts, that my subsequent analysis and discussion is based—as I had thought was clear. While it would make no difference in my conclusions whether the Union agreed or disagreed with the protesters, I note further that the Union also was of the opinion that Respondent practiced racial discrimination.

letting undermined the Union's exclusive representation of the employees; and (2) the Union had made substantial and good-faith efforts to achieve an orderly solution to the problem within the collective-bargaining processes.[4]

Neither of these reasons withstands scrutiny.

The union's right to be the exclusive representative of the employees originates in the principle of collective bargaining established by the Act. This principle requires that the representative of the employees present a single set of demands or goals covering all employees, and that whatever bargain is struck with the representative by the employer be applicable to all employees, so that the employer need bargain neither with splinter groups of employees nor with individual employees, and may not undermine the union by doing so. This in turn implies that the union must have the

[4]The third ground relied on by the Trial Examiner, that the discharged employees were only "self-styled" representatives of others, does not warrant further consideration here, for it is plain the activity was concerted and related to conditions of employment. I do not suppose my colleagues to rely on this ground. The Trial Examiner's inference that the protesting employees, by seeking a meeting with the Employer's president, were thereby seeking to "bargain" for all minority employees apart from the Union appears unfounded. Their desire to talk to Respondent's president, far from evincing a desire to "bargain," merely reflected a traditional opinion shared by Blacks and often enforced by actual experience that only the president or "boss" of the company can effect permanent solutions to problems involving racial discrimination. Apart from this consideration, there is no rule of law which requires an employee to adjust his grievance with a lower ranking official or which transforms a grievance when presented to the president of a company into collective bargaining. Nor is there any reason why a grievance may not pertain to a group rather than an individual complaint and accordingly be resolved on a group rather than an individual basis.

power to balance and adjust the legitimate competing claims within the employee groups, and that whatever adjustment is arrived at fairly by the union and its membership forecloses individual or splinter-group assertion of conflicting positions. It was these considerations of balances, adjustment, and exclusive representation which the Trial Examiner applied to find that the leafletting and picketing here were unprotected.

This application rests upon a serious misconception. Union action preempts or forecloses individual employee action only in those cases where the balancing of competing *legitimate* interests of employees is involved. In the case of racial discrimination, no such balancing is permitted. A union cannot permit a little, or a lot, of racial discrimination against one group in order to obtain something in a different area from the employer, for a different group of employees. Such "balancing" has been unlawful since *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192.

In *Steele* the Supreme Court held that a collective-bargaining agreement entered into between the employer and the union was unlawful to the extent it discriminated against Black employees on racial grounds. The Court reasoned as follows:

> If as the state court has held, the Act confers this power [of exclusive representation free from any challenge by those represented] on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with

power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and *which is also under an affirmative constitutional duty equally to protect those rights.* If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority. [323 U.S. at 198-199, emphasis supplied.]

* * * * *

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. N.L.R.B., supra,*

335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. [Citations omitted.] Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that *the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.* [Citations omitted.]

> The *representative which thus discriminates may be enjoined from so doing,* and its members may be enjoined from taking the benefit of such discriminatory action. *No more is the Railroad bound by or entitled to take the benefit of a contract* which the bargaining representative is prohibited by the statute from making. In *both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right* implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. [323 U.S. at 202-204, emphasis supplied.]

These principles, though first enunciated in Railway Labor Act cases, are equally applicable under the National Labor Relations Act. *Ford Motor Company v. Huffman,* 345 U.S. 330. In so holding, the Supreme Court stated:

> The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in *Steele v. Louisville & N. R. Co.,* 323 U.S. 192, 198-199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an oppropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. *Id.,* at 198, 202-204; *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210, 211; *Brotherhood of Railroad Trainmen v. Howard,* 343, U.S. 768. [345 U.S. at 337.]

The principles of *Steele* have been uniformly followed, refined, and broadly applied in a long line of cases since then, including *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210; *The Wallace Corporation v. N.L.R.B.,* 323 U.S. 248, 255-256; *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768; through *Humphrey v. Moore,* 375 U.S. 335, to its latest expression in *Vaca v. Sipes,* 386 U.S. 171. These cases all make it clear that a union's obligation under this Act is to refrain from actions which permit discrimination on arbitrary or invidious grounds. This duty to refrain, as explicitly stated in *Steele,* includes the duty not to engage in, permit, or tolerate provisions in bargaining agreements, or practices under or outside such agreements, which constitute or permit such invidious discrimination. It follows from this that whenever union conduct falls short of this obligation, it cannot preempt or foreclose the concerted action of employees, outside the collective-bargaining relationship, directed toward doing the very thing which the union itself is obligated to do. If this were not so, we would face the grave constitutional questions concerning the validity of the union's representation which the Court noted in *Steele.*

As this Board pointed out in *Tanner Motor Livery, Ltd.,* 166 NLRB 551, the union is required, by its

duty of fair representation and by constitutional considerations, to support the elimination of racial discrimination; consequently, the protest of racial discrimination in employement *cannot* be in opposition to or at cross-purposes with the union's position. As the Board there held:

> [T]he Board cannot presume or conclude that, contrary to the course being urged by Abramson and Dorbin, the Union knowingly would have taken the unlawful position that it would refuse to represent Negro drivers fairly if hired. Rather, we must assume that these employees were acting in accord with, and in furtherance of, the lawful position of their collective-bargaining agent. For the Board to find, therefore, that the employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy. [166 NLRB at 551-552; footnotes omitted.][5]

[5]The Ninth Circuit, in remanding *Tanner*, did so on the ground that the protesting employees had not first sought to pursue their cause through the union, 419 F.2d 216. In the present case the employees did request or demand that the Union pursue the broad overall grievance and it was only after the Union declined to do so that they began the picketing and leafletting. The court left standing the Board's finding that employees who engaged in concerted protests of an employer's racially discriminatory practices were entitled to the protection of Section 7 of the Act.

In the recent case of *Washington State Service Employees State Council No. 18*, 188 NLRB No. 141, this Board held that the protection accorded to such protests in *Tanner Motor* extended even to protests which occurred outside the immediate employer-employee relationship. As this recent decision clearly demonstrates, the right to engage in such activities stands on a different footing from the collective-bargaining relationship.

To hold otherwise would permit a union to control the scope, direction, pace, and degree of elimination of racial discrimination, of which any voluntary tolerance by the union breaches its duty of fair representation. The only permissible collective bargaining concerning racial discrimination is its elimination.

No court has permitted the existence of a collective-bargaining agreement to stay its hand in ordering an employer to eliminate discrimination. Further, employers can unilaterally change existing collective-bargaining agreement provisions which have discriminatory effects and may do so free from the threat of a strike. See *U.S. v. Local 189, Papermakers,* 282 F. Supp. 39, 42-44 (E.D.La., 1968). As to discriminatory practices which are not derived from or are not inherent in the collective-bargaining agreement, employers are not only free unilaterally to eliminate such discrimination, but are dutybound to do so. They cannot be heard to protest that their failure to eliminate discriminatory practices or to treat with employees who concertedly protest such practices is in derogation of the exclusive representative status of the union. Nor may they shift their responsibility under the national labor policy to eliminate all racial discrimination to the union by making such illegal discrimination a matter solely within the jurisdiction of a grievance-arbitration procedure, thereby placing the burden largely on the union and providing themselves with a ready defense to any and all concerted activities by their employees to directly eliminate discriminatory practices. If a union position in favor of the elimi-

nation of *some* but not all racial discrimination can foreclose concerted employee activity to remove *all* racial discrimination, collective bargaining on this subject is converted from a shield protecting employees against racial discrimination into a sword by which such protection can be cut down or cut back. As the Court held in *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232, 239, the Railway Labor Act

> imposes upon the [union] the duty to represent all members of the [unit] without discrimination and *invests a racial minority of the [unit] with the right to enforce that duty.* [Emphasis supplied.]

Steele, supra, held that the members of the union "may be enjoined from taking the benefit of [the] discriminatory action" and the employer is not "entitled to take the benefit" of the discriminatory practices, and *Graham, supra,* held that the act "invests a racial minority of the [unit] with the right to enforce that duty" of fair representation. Thus the victims of discrimination have a right under the Act to sue both the employer and their union in order to end the discrimination. If union inactivity to end discrimination cannot cause such extreme measures by the employees to lose them the protection of the Act, plainly that protection cannot be lost by the employees' efforts at persuasion here.

Accordingly, the principle of exclusive representation by the union cannot preclude the picketing and

leafletting the employees engaged in here, nor deprive such activity of protection under the Act.

It is the Board's apparent inability to retain a grasp on these principles which led the Supreme Court, in *Vaca v. Sipes,* 386 U.S. 171, to hold that the Board does not have preemptive jurisdiction over breaches of the duty of fair representation and that the courts retain concurrent jurisdiction over such violations of this statute. In explaining its reason for such conclusion, the Court stated that should this Board be found to have preemptive jurisdiction

> the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint [citations omitted]. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, *we cannot assume from the NLRB's tardy assumption of jurisdiction* in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employees' statutory representative. [386 U.S. at 182-183; emphasis supplied.]

In addition to having made a "tardy assumption" of its responsibilities in this area in the past, the Board here, by holding the concerted conduct of the employees to be unprotected and thus sanctioning their

discharge, places itself in the position of participating in and aiding and abetting the continuance of those phases of racial discrimination which the Union elected not to try to remedy. In *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company),* 147 NLRB 1573, the Board stated that it "cannot validly render aid under Section 9 of the Act" to a labor organization which discriminates racially. Yet here, the Board as an organ of the Government, by withdrawing its protection from these employees who are protesting racial discrimination, is breaching its constitutional and statutory obligation not to aid or permit such discrimination. *Brown v. Board of Education,* 347 U.S. 483; *Shelley v. Kraemer,* 334 U.S. 1.

The Trial Examiner also relied upon the Union's good-faith efforts to achieve an orderly solution to the problem within the collective-bargaining relationship as a ground for finding that the concerted activity outside union channels was unprotected.

This position misconceives the problem. The question is not whether the Union moved as vigorously or as effectively as it reasonably could have. It may have done so. The Employer's economic power and the desire to retain economic benefits of racial discrimination may impose severe limitations on a union's ability to make progress on this front. Indeed, there is no intimation in this case that the Union had the ability to do substantially more than it had undertaken to do, and the Employer's prompt retaliation by discharging the picketing and leafletting employees suggests that perhaps the Union may have been exert-

ing the full range of its power and ability to eliminate racial discrimination.[6]

The union's own judgment of its capabilities with regard to the pace and scope of eliminating the discrimination may result from its own fair estimate of the realities[7] and in that sense may not be grounded in bias or hostility. But the absence of subjective bias or animus is irrelevant to the duty of fair representation, and it does not follow from the absence of hostility by the union that the employees cannot them-

[6]The reverse, of course, may also be true, with the union rather than the employer exercising the greater power and resisting the elimination of discrimination. The existence of racial discrimination does not automatically imply that both the union and employer have committed violations of the Act, though this may be true in some cases. The issue can be resolved by charging both with violations, ascertaining through the hearing process which was the responsible party, and holding it liable for the remedy. The preceding portion of this footnote and the paragraph in the text to which this note is appended make it plain, contrary to the statement of the majority in fn. 2, that I make no assumption that the Union here has breached its duty of fair representation; rather, the reverse is true. The further statement in fn. 2 that I also assume or infer that because of this breach the Union should forfeit its status as bargaining representative is gratuitous. I have suggested no such proposal, either explicitly or implicitly.

[7]It hardly follows from this, of course, that the Trial Examiner was correct in his conclusion that the Union was *in fact* "endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention." The record shows an unexplained time lag between May and September when the Union apparently did nothing. At the May meeting, the disenchanted employees asked for a delay only until the return of employee Young who was about to go on vacation. In addition, there is no evidence that the Union actually investigated the merits of the numerous complaints Johnson received from approximately 40 employees who attended the April 3 meeting. Indeed, there is evidence in the record that throughout the summer various employees expressed to Johnson frustration at the delay and implored him to take action. It is apparent that the delay engendered suspicion of the motives of the Union and that the frustrations built up during the summer months contributed to the discriminatees' resort to the activities for which they were discharged.

selves then take action under the protection of the Act in support of the complete elimination of racial discrimination. The right to be free from racial discrimination in employment does not arise solely from this statute creating union representation but, as *Steele* held, is in substantial part based upon the Constitution which requires the exclusive representative under this Act to refrain from tolerating racial discrimination respecting terms and conditions of employment. In this respect, it is analogous to the employer's freedom of speech to oppose unions, or the union's freedom of speech in handbilling: There are some respects in which it cannot be circumscribed or limited by the Act or by this Board. One of these is the freedom from limiting the protection of the Act by union preemption through the union's assertion of a lesser opposition to racial discrimination than the protesting employees assert. If the employees cannot engage in concerted activity to eliminate racial discrimination entirely after the union has declined to try to do so, a union interested in retaining discrimination can preempt the field by moving only at a snail's pace, or in token areas.

Finally, the doctrine enunciated by the Court in *Steele* has been embraced by the Congress in the enactment of Title VII of the Civil Rights Act of 1964, so that the national labor policy itself specifically forbids racial discrimination in the terms and conditions of employment, and its existence is unlawful.[8]

[8]Section 704(a), 42 U.S.C. § 2000(e)—3(a). This act establishes additional governmental agencies and procedures for carrying out this policy, but of course does not relieve this Board of its continuing responsibilities.

The Act we administer must be read consistently with other Federal statutes which establish the national labor policy. *Textile Workers Union of America, AFL-CIO v. Lincoln Mills*, 353 U.S. 448, 456-458. To withdraw the protection of this Act from these employees whose concerted protest was in furtherance of the national labor policy, merely because their Union stopped short of assuming its full obligations under the statute, is contrary to the express purposes of Congress and to the national policy itself.

Consequently, the employees' handbilling and leafletting remained concerted activity and protected under Section 7 of the Act, and the discharge of the employees for such activity violated Section 8(a)(1). Accordingly, I think we are required to reverse the Trial Examiner and find the discharges to be unlawful.

Dated, Washington, D.C.,
July 22, 1971.

Howard Jenkins, Jr., Member
National Labor Relations Board

Member BROWN, dissenting:

I agree with Member Jenkins, though not with his rationale in its entirety, that Respondent violated Section 8(a)(1) of the Act by discharging two employees, Hawkins and Hollins, who engaged in orderly picketing to protest alleged discrimination against minority group employees with respect to terms and conditions of employment.

The Respondent, a member of a multiemployer group, is signatory to a collective-bargaining agreement with Department Store Employees Union. Section 21(E) thereof provides:

> No person shall be discriminated against in regard to hire, tenure of employment or for status by reason of race, color, creed, national origin, age or sex . . . .

and section 5(B) reads:

> Any act of any employer, representative of the Union or any employee that is interfering with the faithful performance of this agreement—may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement.

The agreement also provides for no-strikes or lockouts and other sections detail the composition and functions of the Adjustment Board and provide for arbitration where an impasse is reached between union and management representatives appearing before the Board.

In April 1968, it became an "official" position of the Union that Respondent was discriminating against employees of minority races, especially against Negroes and older employees. It so informed the Respondent. Nothing came of the complaint. In time, and after further discussion with minority group employees and governmental and other interested agencies, it was agreed that the Union would take whatever steps necessary, including arbitration, to adjudicate the employees' grievances. Accordingly, on September 4, the Union formally charged the Respondent with breach of Sections 21(E) and 5(B) and asked for an Adjustment Board meeting, although it was prepared to proceed to arbitration if the Respondent were willing.

The Union's attempt to adjudicate the grievances on an individual basis met with objections from Hawkins and Hollins and other employees. They desired the matter to be presented as an issue affecting all employees, and insisted on meeting with Respondent's president. It is not clear whether the employees in attendance were only those whose grievance the Union was prepared to prosecute then. In any event, the meeting apparently terminated when Hawkins, Hollins, and the other employees walked out.[9] However, as the result of the Union's representations one employee, who had complained about discrimination in the past, was promoted and one other employee was said to have benefited from the Union's intervention.

The efforts of Hollins to meet with Respondent's president to present his views and to discuss what was happening among minority employees were unsuccessful. On November 2, Hawkins, Hollins, and at least two other employees began picketing the Emporium. The picketing was on the employees' own time, it was orderly, and was accompanied by the distribution of pamphlets which called on the public

[9]Another meeting of the Adjustment Board was held without the presence of employees who walked out but what, if anything, resulted therefrom is not indicated.

to boycott Respondent because of its alleged racial policies. The Respondent followed with a warning to the employees that their charges were untrue, their activities injurious to the Respondent, and that they could be discharged if these activities continued. When a week later the employees again picketed the store, Respondent discharged Hawkins and Hollins. The reason assigned was the distribution of the boycott pamphlets on November 9. The Union thereafter protested the discharges to the Respondent, although it was not the one to file the charge in the instant proceeding. It was neither charged nor found that the Respondent had in fact discriminated against it (*sic*) minority employees.

The General Counsel maintained that the employees had reasonable grounds for believing that discrimination existed, and the Trial Examiner found that because of the "official" position adopted by the Union, of which the two employees had knowledge, Hawkins and Hollins acted in a good-faith belief that Respondent was practicing discrimination.[10]

The Trial Examiner acknowledged that "concerted employee activities with an object of bettering the working conditions of employees belonging to minority groups . . . are protected under the Act is hardly open to challenge," and that, unlike the situation in *Tanner*[11] there is no evidence that the picketing had as an object the hiring of minority group

[10]I agree with the Trial Examiner that there is no basis for drawing an inference that the Respondent discriminated against the employees on racial grounds. Nor would I find that the Union on its part breached its duty of fair representation.

[11]*Tanner Motor Livery, Ltd.*, 148 NLRB 1402.

employees. In dismissing the 8(a)(1) allegation of the complaint, however, he concluded that the employees had, nonetheless, lost the protection of the Act because their activities amounted to, in short, no less than a demand that the Respondent bargain with the picketing employees for the entire group of minority employees on terms and conditions of employment.

I find, however, that the Trial Examiner misconceived the nature of the employees' concerted activities. There is nothing in the evidence, on which the Trial Examiner relied, indicative of a purpose to "negotiate" with Respondent's president on any terms or conditions of employment. All that is shown is that Hollins told Batchelder he wanted to "discuss what was happening among minority employees," that the employees picketing would be satisfied with nothing less than a meeting with him, that they wanted to "talk to the top management to get better conditions for the Emporium," and that they were seeking to accomplish their objectives through "group talk and through the president if we could talk to him." Granted that the employees were seeking "better conditions" and a meeting with Respondent's president for that purpose, it is nonetheless apparent that what the Trial Examiner conceived as a demand for bargaining for the minority employees was no more than an effort on the part of those seeking the meeting to urge upon the president to use his good offices to see to it that the alleged discriminatory treatment of the minority employees, which both the employees and the Union believed in fact existed, and were

in violation of an express provision of the contract, was corrected. Such a course was unquestionably open to the Respondent to take without in any way infringing on the Union's status as the recognized bargaining representative.[12] Indeed, it was an obligation imposed upon Respondent not only by the contract's nondiscrimination provision, but by the mandate of Title VII of the Civil Rights Act of 1964.[13] Moreover, it is equally clear from the enactment of Section 9(a) that it was not congressional intent that the mere submission of a grievance by an employee was to be considered in derogation of the rights of employees to bargain through their chosen representative.

There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an

[12]Section 9(a) of the Act.

[13]The Supreme Court cited in *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31, 47, that the Board may not ignore other and equally important congressional objectives. In enacting the Civil Rights Act of 1964 Congress expressed its deep concern that the invidious practice of discrimination in employment based on racial grounds be eliminated. And such has similarly been the concern of the judiciary. (See *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192.) It is not, of course, the Board's function to enforce provisions of the Civil Rights Act but I think it is incumbent on the Board, when presented with an issue involving racial discrimination in employment, that it should not lightly condone disciplinary action against employees engaged in concertedly protesting alleged discrimination because of race unless the concerted conduct involves a most serious breach of the policies underlying our own Act. Such is not the case here.

agreement but simply to urge Respondent to take action to correct conditions of racial discrimination which the employees reasonably believed existed at the Emporium. In fact, insofar as this record shows, the picketing employees sought only a simple conference to call attention to their situation; it is not even clear that they intended to present a formal grievance. I cannot see how on the tenuous evidence present in this case, the majority can find that "to extend the protection of the Act to the two discharged employees would seriously undermine the rights of employees to bargain collectively through representatives of their own choosing."

I find no ground justifying the discharges of the two employees for engaging in concerted activity within the meaning of Section 7 of the Act.[14] I would reverse the Trial Examiner, find the 8(a)(1) violation, and grant the appropriate remedy.

Dated, Washington, D.C.
July 22, 1971.

Gerald A. Brown, Member
National Labor Relations Board

[14]The Trial Examiner did not find, nor would I, that the language used by the employees in their appeal to the public was so intemperate as to deny them the protection of the Act. (See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966). *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998, 1007 (C.A. 5, 1969). Nor do I find merit in Respondent's contention that the employees' conduct was sufficiently disloyal to make such conduct unprotected activity. The picketing was conducted on the employees' own time and there was no withholding of services and no request that other employees do so. The pamphlets did not attack the quality of Respondent's goods or services but only the discriminatory conditions of employment it was believed prevailed. See *Edir, Inc., d/b/a Wolfie's*, 159 NLRB 686.

United States of America
Before The National Labor Relations Board
Division of Trial Examiners

Branch Office
San Francisco, California

Case No. 20-CA-5304

The Emporium and Western Addition Community Organization	}

Walter L. Kintz, Esq., and Douglas H. Barton, Esq., for the General Counsel.

George O. Bahrs, Esq., of San Francisco, Calif., for the Respondent.

Kenneth Hecht, Esq., of San Francisco, Calif., for the Charging Party.

TRIAL EXAMINER'S DECISION

William E. Spencer, Trial Examiner: The complaint in this proceeding,[a] based on a charge duly filed on November 19, 1968, alleged in substance that the Respondent herein, in violation of Section 8(a)

[a]Dated March 4, 1969.

(1) of the National Labor Relations Act, hereinafter called the Act, discharged two of its employees, Jim Joseph Hollins and Tom Hawkins, because of their protected concerted activities. Respondent in its duly filed answer denied the said allegation.

A hearing participated in by all parties was conducted before me in San Francisco, California, on April 8, 1969, and on or before May 15, 1969, each of the parties filed a brief.

Upon the entire record, my observation of witnesses, and upon consideration of the excellent and helpful briefs filed with me, I make the following:

Findings of Fact

I. The Business of the Employer

Respondent, a California corporation, engaged in the operation of retail stores in the State of California, during the past year in the course and conduct of its business operations, made gross sales in excess of $500,000, and purchased and received goods valued in excess of $50,000 directly from outside the State. This proceeding is directly related to the operation of its San Francisco department store, The Emporium.

II. The Labor Organization Involved

Department Store Employees Union, called the Union hereinafter, is a labor organization which at all times material herein was the exclusive representative of Respondent's employees in an appropriate unit, at its San Francisco store, The Emporium.

III. The Alleged Unfair Labor Practices

1. *The issue*

This is a discharge case brought under Section 8(a)(1) of the Act. On November 11, 1968, The Emporium, a leading San Francisco department store, after a written warning, discharged two of its employees, Tom Hawkins and James Joseph Hollins, both Negroes, when for a second time they picketed the store on their own time, both times calling for a boycott of the store by a minority race on the ground that the store was "racist."

2. *Respondent's bargaining agreement*

At all material times the Respondent was a member of a multi-employer group and as such signatory to a collective bargaining agreement with the Union. No question is raised as to the validity of the agreement or the status of the Union as exclusive bargaining representative of Respondent employees in an appropriate unit.

This agreement provides, *inter alia.:*

Section 36(A), "There shall be no strike or lockout during the life of this agreement."

Section 21(E), "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex."

Section 5(B), "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement."

Section 36(B, C, D, E, F) contains a detailed description of the functions of the Adjustment Board, its composition, and provisions for arbitration where an impasse is reached between union and management representatives appearing before the Board.

3. *The issue of racial discrimination*

Walter L. Johnson, chief executive officer of the Union, testified credibly that after discussions with employees in April, 1968, it became the "official" position of the Union that discrimination against employees belonging to minority races existed in Respondent's San Francisco store. Following a meeting in April, the Union's position with respect to discrimination and numerous other matters affecting employment in Respondent's store, was formulated in a letter dated April 11, which included, *inter alia,* this language:

> Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

According to Johnson's credited testimony copies of this letter were distributed to several union members and it was also served on the Retailer's Council, the bargaining agent for the multi-employer unit with which The Emporium was affiliated. Following the issuance of this letter, according to Johnson, there were meetings with the Retailer's Council and The Emporium, at which it was agreed that the Respondent would "look into the matter" of discrimination and see what could be done to "improve conditions."

In May, at the request of a union member, Johnson met with some ten employees. At this meeting, according to Johnson's credited testimony, the main concern was the promotion of one Russell Young, a Negro. (This same matter had been broached in the prior meeting.) When it was pointed out that Young was leaving on his vacation it was agreed to take the matter up at a later meeting. This later meeting occurred about September 3 at the Union hall. In addition to Union representatives and some Emporium employees, it was attended by representatives of the Fair Employment Practices Committee (FEPC) and the Equal Economic Opportunity Commission (EEOC). The matter of Young was again stressed, it being claimed that he had been passed over for a promotion which was given, instead, to an "outsider."

Johnson testified concerning the September 3 meeting:

> At this meeting there were quite a few things discussed and we specifically informed the individuals that we were going to go into an Adjustment Board, that we wanted to process these grievances and we felt that there were problems of discrimination and it was my own personal feeling that all the discriminatory acts should be processed and that we ought to follow through and take care of it.
>
> At this meeting I specifically . . . pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other people involved in it, because we had very strong feelings on the question.
>
> It was agreed at that time and they were advised by both Mr. Scott (EEOC) and Mr. Smith (FEPC) to take it to the union and that the union should follow through and take whatever steps are necessary up to and including arbitration [provided for in the bargaining agreement] to adjudicate the grievances.

Both Hollins and Hawkins were present at this, and prior meetings.

By letter dated September 4, the Union addressed the Retailer's Council as follows:

> Department Store Employees Union has made every effort to resolve the grievances raised with The Emporium regarding matters concerning our members employed in the stock and marking areas.
>
> Apparently we have been somewhat less than successful in our efforts and it appears the only recourse we have is to request a meeting of the

Adjustment Board to hear the entire case. This communication will serve as our request for a meeting of the board.

We specifically charge the Emporium with violations of Section 5 B and 21 E, of the Agreement between the San Francisco Retailers Council and Local 1100. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.[1]

We are ready to proceed to immediate arbitration if the Emporium is agreeable.

Would you kindly contact me in order that a mutually convenient date may be agreed to.

Pursuant to this letter a meeting of the Adjustment Board, as provided for under the bargaining agreement, occurred on October 16. At this meeting the four employees who later picketed the Respondent, including Hawkins and Hollins, stated in effect that they would not participate as individuals but only as a group; that they objected to prosecuting grievances on an individual basis and wanted the matter of racial discrimination presented as an issue affecting all employees belonging to minority races; that they insisted on meeting with Respondent's president;[2] and would not go ahead with the Adjustment Board hearing. Thereupon, the four of them walked out of the meeting.

[1]A transcript was made of the meeting of September 3.

[2]Hawkins testified that Hollins said that they would not testify as individuals but only *as a group* whose main purpose was to talk to the Respondent's president and to *reach an agreement* with him on conditions at the Emporium; that they wanted to talk to the president or to no one.

Johnson, who was unable to attend the meeting but who called to inquire about it, testified concerning his reaction on being informed that the four employees refused to testify as individuals:

> I wasn't very happy because we had involved everybody including our attorney and we had prepared to go on into arbitration.
>
> Several times I informed all of the people that in my opinion the only solution to the problem was to follow the agreement in order that we could then have some lasting effect on any situation of discrimination.
>
> I feel very badly that we were not able to process it after the testimony was not presented by the affected individuals, and this is very vital testimony, our attorney advised that it would be very difficult to proceed to arbitration because we would not have a whole case to present.[3]

With respect to Russell Young concerning whom complaints had been filed with the Union on several occasions, apparently on the basis of the Union's representations he was promoted to the office of first assistant manager. The date of his promotion is not established but it occurred before the start of any picketing. Hawkins named one other, Fata, as having benefitted from the Union's intervention.

[3]Possibly there was a second meeting of the Adjustment Board on October 18, not attended by the four employees who walked out on the prior meeting, but what business, if any, was transacted there, is not sufficiently developed in the record for a finding.

4. *The picketing*

Unable to have the issue of racial discrimination as they viewed it processed by the Union as a single issue affecting all employees belonging to minority races, Hollins attempted to present his views in the matter to Respondent's president, Batchelder. He told Batchelder that he wanted to discuss what was happening among minority employees. Batchelder replied that Personnel Director, Henderson, attended to such matters and he should see Henderson who took care of "problems like that." Hollins testified that he had previously discussed the issue with Henderson but now refused Batchelder's suggestion.[4]

On October 22, Hawkins, Hollins, and two or three other employees, held a press conference regarding what they viewed as Respondent's discriminatory racial policies. Attending this meeting were representatives of local newspapers and radio stations. It being admitted that the statements these employees made public at this meeting were substantially the same as the text of pamphlets they later distributed while picketing, reference is made to that text to be reproduced below.

On the following Saturday, November 2, Hawkins, Hollins, and at least two other employees not named in the complaint began picketing in front of The Emporium. The picketing occurred on their own time.

[4]Later, while the picketing was in progress, Johnson saw Hollins and when Hollins told him the only one they [the picketeers] wanted to talk to was Batchelder, replied that he, Johnson, was spokesman for the Union, represented a few thousand clerks, and had never met Batchelder.

The entrances to the store were not obstructed. There was neither violence nor incitation to violence. The text of the pamphlets distributed to passersby by those picketing follows:

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

For years at The Emporium black, brown, yellow and red people, have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employmeint and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

5. *The discharge*

On November 7, Hawkins and Hollins were called to the office of Respondent's manager of labor relations, Paul Ehrenfried, and handed the following notice:

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

On November 9, Hollins and Hawkins for a second time, again on their own time, picketed The Emporium and handed out pamphlets to the public which in all material respects were identical with the pamphlets distributed on the prior occasion. As on the prior occasions there was no violence, no incitation to violence, no criticism of Respondent's product, and no blocking of entrances to Respondent's store.

On November 11, the Respondent discharged Hollins and Hawkins. The discharge slips given these employees bore the notation:

You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968 in front of The Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

6. *The Union vs. the picketing*

In view of what appears to be the General Counsel's position that the Union concurred or at least acquiesced in the picketing activities of the two dischargees, in addition to what has already been noted of the differences expressed between the Union's approach to the processing of grievances with respect to the issue of racial discrimination under the bargaining agreement and that pursued by Hawkins and Hollins, it is noted that W. Griffin, the Union's business agent, testified that Johnson did not advise these employees to picket, but told them it was up to them as individuals, that they could take whatever "actions they wished," but he hoped they would follow the union program through arbitration and the Adjustment Board. Griffin further testified that after the picketing started he told Hawkins that they—the picketing employees—were going the wrong way about it, that they should "let the Union handle it." Johnson testified that he never warned or instructed employees not to engage in activities on their own, but at the September meeting, when some employees exhibited frustration, and it was suggested that The Emporium be picketed, the employees were informed "that we had a contract, we couldn't participate in any boycotting activities, that individuals could take whatever

action they wanted to as long as it was legal," that "an individual had a right to take action that a Union could not take." He advised the employees that if the matter went to arbitration it might take as much as 7 months to get a decision, but, according to him, they wanted something "dramatic." "I informed them," he testified, "what an individual wanted to do on their own, they could do, but I wasn't going to engage in any drama, but I wanted some orderly legal procedures that would have some long lasting effect." Johnson further testified that he told the employees that the Union accepted no responsibility for their actions as individuals as long as it was not concerned with the contract. "We will advise them as to what we thought was the best procedure, but it was obvious that our advice didn't carry much weight at the time." Finally, Johnson testified that about the time the pamphlets were being distributed by those picketing he talked to Hollins, told him that he did not want to see him fired, and that the only way to resolve the matter was through arbitration. It was then that Hollins replied that the "only one" they wanted to talk to was the president of Respondent, Batchelder.

The Union did file a complaint or protest with the Retailer's Council on the discharge of Hawkins and Hollins, but did not file the charge which initiated this proceeding.

7. *The evidence on discrimination*

The General Counsel very properly disavowed any intention or purpose of establishing as a fact that the

Respondent discriminated against any of its minority employees, but because of the wording in footnote 6 of the Board's Supplemental Decision in *Tanner Motor Livery, Ltd.*, 166 NLRB No. 35, namely: "It is sufficient for the purposes of this decision that the employees had a reasonable basis for so believing [that there was a discriminatory hiring policy based on racial origins]" and pursuant to the Trial Examiner's prodding, introduced such evidence as he considered proper to show "reasonable basis."[5] In doing so, Hollins and Hawkins were interrogated on their knowledge of discriminatory acts engaged in by Respondent, and the General Counsel and Respondent jointly introduced a summarization of Respondent's hiring and promotion records. It is further noted that in its warning notice to Hawkins and Hollins, Respondent specifically charged them with falsely accusing Respondent of racial discrimination, and acting in a manner intended to injure the reputation of The Emporium. Because of these several considerations, and because of my own uncertainty as to what the Board would regard as a "reasonable basis" for the publications issued by Hollins and Hawkins as part of their picketing activities, I note briefly such evidence as was produced on the issue of racial discrimination.

Reference has already been made to complaints made to the Union of Respondent's failure to promote

[5] Actually, the General Counsel's position, as I understood it, was that the good faith of those engaging in the picketing and related activities was all that was required to establish the protected nature of those activities.

Russell Young. Both Young and one other apparently the subject of complaints of racial discrimination, received promotions prior to any of the activities engaged in by Hawkins and Hollins which caused their discharges. Although questioned at some length in the matter, the only actual case of discrimination that either Hollins or Hawkins was able to recall had to do with Respondent's failure to make Hollins a supervisor. It appears that sometime prior to October, 1968, Hollins' supervisor told him that he considered him "very highly to become a supervisor," but that to do so he would have to get a haircut. He was then wearing his hair in what is generally known as an Afro-natural haircut. Apparently he refused and was not made a supervisor at that time. In October, 1968, when the supervisor in his department became ill, he was asked to take the position of temporary supervisor and did so, with the pay of supervisor, whether with or without the suggested haircut is not shown.[6] He was told at that time that he was "suited" for the job of permanent supervisor and that Graff, his superior, would like to see him take it. Hollins replied that he did not want the job because he had been previously "passed over." This occurred before Hollins had engaged in any of the activities which precipitated his discharge. As to Hawkins' testimony that

[6]Hollins acted as temporary supervisor for a comparatively brief period in the fall of 1968, after which he refused the position of permanent supervisor. It does not appear from the evidence that as acting supervisor he exercised independent judgment sufficient to constitute him a supervisor within the meaning of the Act, and for the major portion of his time exercised no supervisory functions whatever. Accordingly, I have treated him as a rank-and-file employee.

Hollins was denied a supervisor's badge, Hollins admitted that he did not know whether temporary supervisors normally wore badges.

This is the single specific case of alleged discrimination alluded to in the testimony of Hawkins and Hollins. Otherwise, their testimony on their "belief" that Respondent engaged in racial discrimination rested on the "beliefs" of others. Following their press conference and first instance of picketing, they canvassed a number of employees from minority races and compiled notes on the responses they got, responses which showed that these minority employees believed they were discriminated against. Obviously, this could not have motivated their picketing activities in the first instance.

The General Counsel in stressing the "reasonableness" of the dischargees' belief, relied on Respondent's employment records filed with EEOC which showed, *inter alia,* that less than two percent of the total complement of Respondent's officials and managers were from minority groups; and that Respondent had only one minority employee in a total of 47 on-the-job trainees. On the other hand, Respondent's assistant president for the past eleven years, Howard Carber, testified without contradiction that employment records filed with EEOC, referred to above, were not limited to The Emporium store where the dischargees were employed but to the entire Emporium organization which embraces numerous stores in different locations; that it was normal to start employees at the lowest rate unless he is a skilled crafts-

man, that both himself and Respondent's president started as stock clerks; that Emmett Powell, now traffic manager and a Negro, started as a stock clerk and was promoted some six times before achieving his present position; that Andrew Howard, a Negro, was promoted up through the ranks and presently directs some 500 employees; that The Emporium put black sales employees on the floor before any other department store in San Francisco; that any complaint of discrimination would be referred immediately to the personnel office and if sustained, corrective action would be taken.

8. *Concluding findings*

The discussion which follows will fall into two general categories: (a) whether the type of picketing with its boycott appeal and invective against the Respondent employed both orally and in the pamphlets distributed just outside Respondent's store, was protected activity. That it was "concerted" there is no doubt. (b) On the assumption that it was protected, whether the picketing and related activities engaged in by Hawkins and Hollins were violative of the terms of Respondent's bargaining agreement with the Union and inconsistent with and disruptive of the orderly course of procedures under that agreement for the settlement of grievances, to a degree that it would not effectuate the policies of the Act to extend its protection to such activities.

(a) Preliminarily it is repeated that there was neither violence nor threat of violence by those picket-

ing; entrances to The Emporium were not blocked; and no attack was made on Respondent's merchandise. That concerted employee activities with an object of bettering the working conditions of employees belonging to minority groups or to majority groups, for that matter, are protected under the Act is hardly open to challenge. The only real novelty in the *Tanner* case (*Tanner Motor Delivery, Ltd.*, 148 NLRB 1402), on which the General Counsel and the Charging Party rely, is that the concerted activities in that case had as its object the *hiring* of minority group employees. There is no evidence that the picketing which occurred here was to require the *hiring* of additional employees from minority groups, or that any complaint was registered on that ground with the Union or the Respondent at any time. Therefore the seemingly low percentage of hires from minorities shown by Respondent's employment records, had nothing to do with the employees' good faith or lack of it, in undertaking their picketing activities. The *Tanner* decision has limited application, if any, to the facts here, though some of the language used in that decision may be pertinent, if not controlling.

In *Tanner* the Board while explicitly making no findings and drawing no conclusions that the Employer actually discriminated against minorities in its hiring practices[7] found in its remand decision in the case (166 NLRB No. 35) that the Employer's failure to hire any Negroes among the 50 to 60 drivers em-

[7]There was in fact no substantial evidence in *Tanner* that any applicant for employment had ever been refused employment because of color or racial origin.

ployed in its business, was sufficient to establish that in their concerted protest the employees in that case "had a reasonable basis" for believing that discrimination in hiring existed, and that their "concerted protest . . . was not grounded on contrived or flimsy evidence, which otherwise might have reflected an intent more to harass their employer than to [eradicate] a noxious working condition."[8]

I have no hesitancy on the basis of *Tanner,* or independently of it, in finding that Hawkins and Hollins believed that Respondent was discriminating against Negroes and other minority groups in matters such as promotions and working conditions. They may well have believed that those conditions were "noxious," but I hasten to add that I draw no such conclusion on the evidence before me. The only concrete and probative evidence in this matter was the requirement that Hollins get a haircut in order to qualify as a supervisor. I would hesitate to conclude that such a requirement was racial discrimination solely because he wore his hair in Afro-natural style, without having a little evidence with respect to Respondent's general grooming requirements relating to both Whites and Blacks. To be sure, as a witness Hollins appeared to me to be literate, lucid, presentable, and personable, but I am not Respondent's personnel director. It is entirely possible that Respondent might object to white males wearing beards and shoulder length hair,

[8]Presumably the Board, not having found that any discrimination in hiring actually existed, in its use of the term "noxious working condition" is referring to the employees' good faith belief rather than any conclusions of its own.

or its Chinese employees wearing their hair in the traditional queue, but what business is that of ours? (The question is purely rhetorical.)

Nor would I draw an inference of discrimination on the basis of the statistical showing of hirings and promotions relating to minority groups without a comparable showing of the ratio of applicants as between minority and majority groups and their comparative qualifications, work records, and reasonable expectations of advancement. In short, only a God-given expertise could substitute for this lack of evidentiary facts, an expertise I do not possess and that could not be derived from the somewhat less sacred precincts of officialdom.

I base my finding and conclusion that Hawkins and Hollins acted in good faith belief that Respondent was practicing discrimination against minority employees solely because it was the official position of the Union (of which they had knowledge) and the belief was widespread among Emporium employees.[9]

Given good faith in their picketing activities, the next problem is whether Hawkins and Hollins took themselves out of the protection of the Act by the invective they used both orally and in the pamphlets they distributed, coupled with a call for a boycott by a minority race. To recapitulate, the invective in question accused The Emporium of discrimination in working conditions accorded their minority employ-

[9]This finding is not grounded on the saying that "where there is smoke there is fire," only that where there is so much smoke one may have a good faith belief that there is fire.

ees, called it a "20th Century Colonial Plantation," equated its treatment of Negro employees with the "Slave Mines of South Africa," employed the term "Racist Pig" in referring to Respondent, and made this appeal: "Wherefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly through-out the Emporium."

A certain amount of name-calling and exaggeration has been found permissible when occurring in collective bargaining sessions, and in strike and picketing cases. At times the use of abusive epithets has been ascribed to "animal exuberance" or termed "spontaneous." This cannot apply here. Before there had been any picketing the employees in question held a press and radio conference in which they used substantially the same language, and made substantially the same appeal. In short, whatever else may be said of the character of the total performance, it was premeditated, deliberate, made with an intent to do harm to Respondent's business, unless and until the Respondent made what those picketing would regard as an appropriate response. Attention has also been paid in the decisions to the environment in which the abusive conduct takes place, on or off the job, during or outside working hours, etc. Here the conduct occurred off the job and on the employees' own time. Had they while on the job, singly or concertedly, without immediate provocation addressed their supervisors or officers of management as "racist pigs," and been discharged therefor, I hardly think their em-

ployer would be faced with a complaint issued by this agency.[10] It seems to me that the employer suffers far greater injury when such accusations and abusive terms are addressed to the general public and used as incitation to boycott.

The General Counsel would distinguish this case from cases in which the protection of the Act was denied those acting concertedly because they attacked the Employer's product and such attack was unrelated to a labor dispute and unaccompanied by an appeal for public support. *N.L.R.B. v. Electrical Workers,* 346 U.S. 464; *Patterson-Sargent,* 115 NLRB 255, 38 LRRM 1134. The cases, as the General Counsel contends, are distinguishable. Here there was no attack on the quality of Respondent's merchandise, the attack was related to a labor dispute, and it was accompanied by an appeal to the public. I would be

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[10]Such language if accompanied by, say, a hefty shove, a poke in the nose or a kick in the posterior, would almost certainly deprive the offending employee of the protection of the Act no matter how great his good faith motivation, but on the theory (I presume) that "sticks and stones may break my bones but words can never harm me," we must distinguish between the use of epithets and corporeal assault, no matter how flagrant the former or how minor the latter, when we are dealing with strike or picket line activities. Language found permissible by the Board includes such choice epithets as "wop-bastard," "ignorant s-o-b," "scabby bastard," "goddamn bastards," etc., but the line is drawn at "indecent and obscene suggestions relating to biological and bodily functions" and language ascribing "the capability of committing an act so foul as to be unmentionable." *Efro Manufacturing Company,* 108 NLRB 245, 249; *Nutone, Inc.,* 112 NLRB 1153, 1171-1173; *American Tool Works Company,* 116 NLRB No. 247; *Longview Furniture Company,* 110 NLRB 1734, 1738 (in which the Board sets forth its rationale). If still interested, see *Bowling Green MFG. Co. v. N.L.R.B.* (C.C.A. 6, No. 18491), 72 LRRM 2301, and *Santa Fe Drilling Company v. N.L.R.B.* (C.C.A. 9, No. 22, 923), enf'ing 171 NLRB No. 27; *Terry Coach,* 166 NLRB No. 76.

reluctant to assume, however, that because verbal assaults are related to a labor dispute and attack an employer's reputation rather than the employer's merchandise, anything goes.[11] With a department store which must depend to a substantial degree on the patronage of minority groups, I should think the verbal assault in such terms as "racist pig" and "colonial plantation" would have a graver potential than an attack on the store's merchandise, and the public would be in no better position to determine the truth or falsity of the accusations.[12]

It is further observed that misstatements of fact, where not deliberately or maliciously false, do not remove an employee engaged in concerted activities from the protection of the Act, and I have already found that Hawkins and Hollins *believed* that Respondent was engaging in discriminatory practices relating to minorities. I have some question in my mind whether when a basis for the employer's discharge action is the untruthfulness of the employee's verbal assault, as it is here, we can dispose of the matter so summarily, but the decisions point in that direction. *Schnell Tool & Die Corp.*, 144 NLRB No. 52; *Tracy Towing Line, Inc.*, 166 NLRB No. 9, 65 LRRM 1575;

[11]As the Bard put it, "Who steals my purse steals trash, 'twas something, nothing, 'twas mine, 'tis his . . . but he who filches from me my good name robs me of that which not enriches him but makes me poor indeed."

[12]Cf. *C. A. Laboratories, Inc.*, 88 NLRB No. 140, 25 LRRM 1381, in which the protection of the Act was denied an employee who called his employer "fascist" and a "fascist lover," but in which the Board found the objectionable language was "not made in a bargaining conference or on a picket line, where lower standards of etiquette generally prevail. . . ."

Bowling Green Manufacturing Co., 169 NLRB No. 15, 67 LRRM 1125; *Home Restaurant Drive-In*, 127 NLRB 635. Cf. *Bowling Green Mfg. Co. v. N.L.R.B.*, (C.C.A. 6, No. 18491), 72 LRRM 2301, reversing 169 NLRB No. 15, 67 LRRM 1124. And where the decisions lead I must follow.

Returning to the language of the pamphlets itself, the General Counsel correctly observes that such terms as "racist pig" have become terms of common usage in the "contemporary civil rights struggle." (Parenthetically, it is noted that as adjudicators under the Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.) I do not know, however, that the currency of this and like terms make them any the less terms of obliquy, or less damaging to the prestige of a department store such as The Emporium. I assume that their gravity depends a good deal on who is at the receiving end, and how great the potential for injury. Here, I think the gravity is substantial and the potential for injury considerable. I cannot say, however, from my study of the cases, that the Board has given persuasive weight to such factors in strike and picketing cases.

(b) *The concerted activities vs. the bargaining agreement*

What we have here is a group of four employees who set out on their own to rectify what they in good faith considered working conditions unfair to minority employees. Apparently, they were self-appointed for there is no evidence that they were

elected or in any way designated by minority employees generally to represent them, they alone walked out of the September 3 meeting, and it does not appear that they were joined in their picketing activities by other Emporium employees. We are concerned with only two of them, Hollins and Hawkins, the other two not being named in the complaint. It matters not whether we as individuals approve or disapprove their conduct, for if we approved it in toto there would still remain the issue of whether their activities ran counter to the bargaining agreement by which the Respondent was bound and had the effect of requiring, if their demands were to be met, that the Respondent bargain on two fronts when it was required by law to bargain on only one. On the entire evidence I am convinced that their activities did run counter to the bargaining agreement and did have that effect.

Aside from the clause outlawing racial and other discrimination, the bargaining agreement set up a comprehensive procedure for the adjustment and arbitration of grievances. The Union was bound to follow those procedures and so was the Respondent. The picketing employees were not satisfied to follow those procedures, but in the words of the Union's president, wanted something "dramatic." The Union declined to submit to their demands that grievances be prosecuted on a store-wide rather than an individual basis, or to endorse their resort to the "dramatic" by way of picketing and the distribution of accusatory pamphlets. There is no basis in the evidence for a finding that the Union approved, endorsed, or in any way

connived in the action taken by the four employees. They were told that the Union would consider it illegal for it to engage in such activities, but they could do what they pleased as individuals. Obviously, the Union could not stop them from acting as individuals, and beyond attempting to persuade them against the course they took, was powerless to prevent it. It would be absurd to say that because they and the Union had a common ultimate objective, these four employees were somehow implementing or strengthening the Union in its position. They were acting outside the agreement and contrary to the Union's advice and urging. All the evidence indicates that the Union, their duly designated bargaining representative, was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment. It is also evident that it was prepared to resort to arbitration to enforce its position that racial discrimination in conditions of employment existed in Respondent's store, and was handicapped in proceeding by the four employees' refusal to assist or to be represented by the Union in the matter.[13]

The evidence further establishes that this was no mere presentation of a grievance, but nothing short of

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[13]Apparently the General Counsel would find the Union's action in filing a complaint with respect to the discharge of the two employees, approval or acquiescence in the action they took. The Union which properly considered that it represented all the employees in the bargaining unit, including Hollins who never affiliated with it, took this formal action because it no doubt considered

a demand that the Respondent bargain with the picketing employees for the entire group of minority employees. This is shown by Hollins' meeting with Respondent's president, Bachelder, in which he told the latter that he wanted to "discuss what was happening among minority employees," his later insistence that those picketing would be satisfied with nothing less than a meeting with Batchelder, and Hawkins' testimony that those picketing were seeking to "talk to the top management to get better conditions for The Emporium," that those picketing were seeking to accomplish their objectives through "group talk and through the president if we could talk to him." It is further clear that the Respondent never refused to have an informal discussion with these employees and referred them to Respondent's personnel director for such discussions, and that they scorned such talks and insisted on negotiating directly with Batchelder.

In sum, to extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on

it its duty to do so in its representative capacity. It is noted, however, that it did not file the charge which initiated this proceeding. To read approval and acquiescence into its formal action would be strained to say the least, and contrary to all the evidence establishing the Union's disapproval of action taken by the dischargees which caused their discharge, and effort to persuade them against taking such action.

the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement. Therefore, aside from the issue of whether the picketing employees engaged in invective and incitation to boycott which denied them protection in their concerted activities,[14] I would dismiss the complaint in this proceeding.[15]

IV. Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in unfair labor practices violative of Section 8(a)(1) of the Act, as alleged.

[14]A matter which I have felt compelled to set up in some detail in the event this decision is reviewed by higher authority.

[15]The warning notice given the two employees establishes the basis on which the discharge action occurred. That notice gave two reasons for the discharge which would follow if they continued in the activities complained of: the untruth of the statements they were making about racial discrimination, and that they were acting outside the ample legal remedies that existed to correct any discrimination that occurred. The reference to legal remedies is reasonably construed as meaning that their course of action lay outside the terms of the bargaining agreement which Respondent and the Union were bound to follow. Cf. *Tanner Motor Livery*, 166 NLRB No. 35.

V. Recommended Order

It is recommended that the complaint be dismissed.[16]

Dated: Oct 20 1969

/s/ William E. Spencer
William E. Spencer
Trial Examiner

[16]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER CORRECTING TRANSCRIPT

On the General Counsel's unopposed motion to correct the transcript of proceedings in the subject case, the following corrections are ordered:

Page	Line	Correction
8	13	change "an objection to their" to "evidence of the"
37	25	change "1966" to "1968"
47	14	change "agreements" to "grievance"

On the Trial Examiner's own motion the following corrections are ordered in statements attributed to the Trial Examiner:

33	18	change "efforts" to "evidence"
44	25	change to read "witnesses who was on the picket line if that was
45	1	add after "wouldn't" the words "admit it."
45	2-5	change to read "The illegal object is not going to be established because of the mental state of somebody on the picket line."
94	18	change "of" to "that"
106	10	strike in its entirety

Dated: Oct 20 1969

/s/ William E. Spencer
William E. Spencer
Trial Examiner

STATUTES

Section 7 of Labor-Management Relations Act:

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Section 9(a) of Labor-Management Relations Act:

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

42 U.S.C. § 2000e-3(a):

§ 2000e-3.

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court, U. S.
FILED
APR 10 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL COMPANY,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

and

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMPANY'S PETITION FOR CERTIORARI FILED OCTOBER 27, 1973
BOARD'S PETITION FOR CERTIORARI FILED NOVEMBER 26, 1973
CERTIORARI GRANTED FEBRUARY 19, 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL COMPANY,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

and

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[The Opinions of the Board and the Court of Appeals are printed in the appendix to the petition in No. 73-696, and the Judgment of the Court of Appeals is printed in the appendix to the petition in No. 73-830.]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 20-CA-5304

In the matter of:

WESTERN ADDITION COMMUNITY ORGANIZATION

11.19.68	Charge filed
3. 4.69	Complaint and Notice of Hearing, dated
3.11.69	Petitioner's Answer, dated
4. 8.69	Hearing opened
4. 8.69	Hearing closed
10.20.69	Trial Examiner's Decision issued
10.20.69	Trial Examiner's Order correcting transcript, dated
12. 3.69	General Counsel's Exceptions to portions of the Trial Examiner's Decision, received
12. 5.69	Charging Party's Exceptions to the Trial Examiner's Decision, received
12.29.69	Employer's Exceptions to portions of the Trial Examiner's Decision, received
12.14.70	Board's Notice of Hearing, dated
1.19.71	Interested Party U.S. Equal Employment Opportunity Commission's Motion for special leave to file brief amicus curiae, and for an extension of time in which to file brief, dated
1.21.71	Interested Party NAACP's Motion for leave to file brief amicus curiae, dated
1.22.71	Board's telegram granting leave to file amicus brief, dated
7.22.71	Board's Decision and Order, dated
6.29.73	Opinion of the Court of Appeals
2.19.74	Order of the Supreme Court granting petitions for certiorari

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTIETH REGION

Case No. 20-CA-5304

IN THE MATTER OF:

THE EMPORIUM

and

WESTERN ADDITION COMMUNITY ORGANIZATION

Room 13025
Federal Building
450 Golden Gate Avenue
San Francisco, California

Tuesday, April 8, 1969

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

WILLIAM E. SPENCER, Trial Examiner.

APPEARANCES:

GEORGE O. BAHRS, 351 California Street, San Francisco, California, appearing on behalf of the Respondent-Employer.

KENNETH HECHT, 1095 Market Street, #313, San Francisco, California, appearing on behalf of the Charging Party.

WALTER L. KINTZ and DOUGLAS H. BARTON, 450 Golden Gate Avenue, San Francisco, California, appearing on behalf of the General Counsel of the National Labor Relations Board.

[3] PROCEEDINGS

TRIAL EXAMINER SPENCER: On the record.

This is a hearing before the National Labor Relations Board in the matter of The Emporium and Western Addition Community Organization, case No. 20-CA-5304, the Trial Examiner appearing for the National Labor Relations Board being William E. Spencer.

Will you state your appearances in the following order for the General Counsel?

MR. BARTON: Douglas H. Barton, 450 Golden Gate Avenue, San Francisco, California.

TRIAL EXAMINER: Is that Barton?

MR. BARTON: Yes, B-a-r-t-o-n, right.

TRIAL EXAMINER: B-a-r-t-o-n?

MR. BARTON: Yes.

MR. KINTZ: Walter L. Kintz, same address for the General Counsel.

TRIAL EXAMINER: For the Emporium, the Respondent in the case?

MR. BAHRS: George O. Bahrs, 351 California Street, San Francisco, California.

TRIAL EXAMINER: For Western Addition Community Organization?

MR. HECHT: Kenneth Hecht, San Francisco Neighborhood Legal Assistance Foundation, 1095 Market St.

[4] TRIAL EXAMINER: Is that H-e-c-h-t?

MR. HECHT: Yes.

TRIAL EXAMINER: Thank you.

You have all been advised about the procedures by the document that is attached to the complaint, therefore, any preliminary remarks on my part are not necessary and we will proceed immediately to the introduction of the formal papers.

MR. BARTON: At this time, Your Honor, I would like to introduce the formal papers. They have been marked for identification as General Counsel's Exhibits 1(a) through 1(f), 1(f) being an index and description of all documents that have been shown to other parties.

(The documents above referred to were marked General Counsel's Exhibits 1(a) through 1(f) for idenfication.)

TRIAL EXAMINER: Any objection?
MR. BARTON: No objection.
MR. HECHT: No objection.
TRIAL EXAMINER: They are received.

(The documents above referred to, heretofore marked General Counsel's Exhibits 1(a) through 1(f), were received in evidence.)

TRIAL EXAMINER: Now I notice from the answer that all the commerce allegations are admitted. Therefore, there is no litigation needed there.

• • • •

[8] MR. KINTZ: We have a few documents, some of which have already been mentioned.
TRIAL EXAMINER: You want to offer them now?
MR. KINTZ: Yes.
MR. BARTON: First we will offer as a joint exhibit, which I have marked as Joint Exhibit 1(a) and 1(b) the EEO report filed by the Emporium and I believe the Respondent is going to stipulate to its authenticity.
TRIAL EXAMINER: What is the materiality of this?
MR. BARTON: Well, in the Tanner case there was reference to whether or not employees had a reasonable basis for the objective which they sought through their concerted activities, so we offer them for that purpose as an objection to their objective facts.
TRIAL EXAMINER: Any obligation?
MR. BAHRS: No objection.
TRIAL EXAMINER: They are received and so marked.

(The documents above referred to, were marked Joint Exhibits 1(a) and 1(b) for identification and received in evidence.)

MR. BAHRS: May I see them?
MR. BARTON: Yes.

We would like also to introduce as General Counsel's Exhibit 2 the collective bargaining agreement which exists between Respondent and Local 1100 of the Retail Clerks Union.
[9] TRIAL EXAMINER: Any objection?
MR. BAHRS: No objection.
TRIAL EXAMINER: Received.

(The document above referred to was marked General Counsel's Exhibit 2 for identification and received in evidence.)

MR. BARTON: Your Honor, at this point we would call Tom Hawkins as our first witness.
TRIAL EXAMINER: Come forward, Mr. Hawkins and raise your right hand.

Whereupon,

TOM HAWKINS

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Barton) State your name please?
A Tom Hawkins.
Q Your address?
A 1132 Scott.
Q Have you ever worked for the Emporium?
A Yes, I have.
Q When did you begin?
A June 27, 1966.
Q Which store?
[10] A Emporium downtown, 934 or—excuse me 834 or 835 Market.
Q Did you ever work in any other location?
A No, I didn't.
Q What were your hours of work?
A I first started off at 7:45 to 4:45 and then I switched from 9:00 to 5:45.

Q When was this change made?
A About a year after I was working, I was sort of dissatisfied in a certain area.
TRIAL EXAMINER: Now if you will just confine yourself to answering the questions, we will save time. He asked you when was the change made?
THE WITNESS: About a year after I was working.
Q (By Mr. Barton) What position did you hold with The Emporium?
A Stock clerk.
Q What were your duties as stock clerk?
A It wasn't any main duties, but I had a certain department.
MR. BAHRS: I can't hear you.
THE WITNESS: I had a certain area that I was covering, I could be changed at any time.
Q (By Mr. Barton) Eventually what would you do from day to day, what kind of work?
A I was working in hosiery, in the hosiery department.
Q Doing what?
[11] A Stocking hosiery.
Q Be a little more descriptive as to how you would go about this process?
A You mean putting the boxes on the shelf, by sizes, you would call it I guess?
Q Well what kind of activities—it is not very enlightening to the Trial Examiner to say—
TRIAL EXAMINER: Just tell us what you did? Did you pick them up someplace and put them someplace?
THE WITNESS: They were in big boxes and I broke them down into different sizes off the trucks.
Q (By Mr. Barton) How were you paid?
A You mean every other week like this?
Q Well, at what—how was your wage computed?
TRIAL EXAMINER: By the hour?
THE WITNESS: Yes.
TRIAL EXAMINER: By the hour?
THE WITNESS: Yes.
Q (By Mr. Barton) What rate were you paid?
A $2.05 an hour to start.

Q Did you receive a raise subsequent to that?
A Yes, I did. It went up to $2.25 and a half.
Q Were you assigned to any specific area or department?
A Yes, I was in the hosiery department.
MR. BAHRS: I can't hear you, sir. You were in the hosiery
[12] THE WITNESS: Hosiery.
Q (By Mr. Barton) Did you from time to time move to a different department?
A Yes, at one time I was running the whole floor by myself.
Q And when you would make such a move who would tell you to go from one area to another?
A Mr. Elliott was one of our immediate supervisors. He would tell me to go to a different area or areas if it was necessary. You never had one certain area to cover at all times.
Q What was Mr. Elliott's position?
A He was the manager of the certain area he was like an assistant, just above the supervisors.
Q Who was your immediate supervisor on the job?
A At first it was Mr. Reese.
Q What was his title?
A He was supervisor.
Q Would Mr. Reese or other persons who held that position do the same kinds of daily activities which you would do?
A Yes, they would.
Q About what portion of their time would they spend doing this kind of activity?
A Eight hours a day and overtime if it was necessary.
Q What part of the time would they be telling you what to do?
A It would be just like—if they want you to make a switch you would go over there, something like that or he would show [13] me what to do and that is it.
Q Who would you contact if you wanted to take time off?
A The medical department.
Q Would you ever contact your immediate supervisor?
A No.

Q If you became sick on the job who would you see?
A We would have to go to our immediate supervisor and then you go to medical and then it is okayed from there if you are sick enough to go home.
MR. KINTZ: I didn't hear your last part of your last answer.
THE WITNESS: If you were sick enough to go home.
Q (By Mr. Barton) Did you ever receive ratings on the job as to the quality of your performance?
A Yes.
Q About how often?
A Every six months.
TRIAL EXAMINER: Had the efficiency or lack of it anything to do with the discharge for this purpose?
MR. BARTON: No.
MR. KINTZ: Not the purpose of this line of questioning.
Q (By Mr. Barton) Now, were these ratings in written form?
A Yes, they were.
Q Who gave them to you?
A The assistant to the top manager. They have so many levels [14] of management to go to. You have supervisors, and assistant managers, assistant to him, then you have a manager and then you have the superintendent.
Q In that hierarchy who would give you the written rating?
A The assistant manager.
Q Who signed them? Were they signed?
A Two or three people would sign them. It would go from him signing it to Mr. Graff signing it to Mr. Hoekenga to sign them. Miss Anibale would rate it.
Q You mentioned Mr. Graff. What was his position?
A He is the manager of the area.
Q Were you ever called in for personal conferences regarding the quality of your work?
A. Yes.
Q About how often did this occur?
A Two or three times.
Q Who would be present on these occasions?

A Well, I talked to different people, like I talked to Miss Anibale one time. She was telling me how my attitude was bad and they couldn't agree with it and it was just a whole bunch of talk.
Q Would you tell us on each of these occasions what individual would be present?
A It would be just the person that I would be talking to like my prior testimony I said Miss Anibale was there at the time I [15] talked to her.
Q Would the floor supervisor be present?
A No, it was always an individual thing.
Q Now, directing your attention to Tuesday, October 22, 1968, do you recall holding a press conference regarding the Emporium's racial policies?
A Yes, I do.
Q When was this, what time of day?
A 10:00 a.m. in the morning.
Q Was this during your regular working hours?
A Yes, it was.
Q Had you notified the Emporium that you were going to be absent?
A Yes, I did.
Q Who did you contact?
A The medical department.
Q What did you tell them?
A That I had to take care of some business and that I would be in that afternoon.
Q What did the person you were talking to say in response?
A They said it was okay.
Q Were did you hold this press conference?
A At the Sun-Reporter Building.
Q Who else was present on this occasion?
A Jim Hollins, Ron Epps, myself and Carlton Washington.
[16] MR. BAHRS: I can't hear the names over here.
TRIAL EXAMINER: Talk up loudly, please.
THE WITNESS: I will try to talk louder.
Q (By Mr. Barton) Who was present?
A Carlton Washington, Jim Hollins, Tom Hawkins, Ron Epps.

Q Were any of these employees of The Emporium?
A Yes, they were.
Q Which ones?
A All of them, all four of them.
Q All four of them?
A Yes.
Q Did they work with you?
A Yes.
Q What were their job positions?
A They were stock clerks. Jim Hollins was you call it a temporary supervisor with no title. He didn't have the badge and they just decided to pay him actually.

TRIAL EXAMINER: I didn't get that last, they, "Just decided to pay him"?

THE WITNESS: Yes. At first they didn't give him the rate of pay and then they decided that they would give him the rate of pay.

TRIAL EXAMINER: What rate of pay?

THE WITNESS: Supervisor's pay.

[17] TRIAL EXAMINER: Do you know when that decision was made?

THE WITNESS: After we had a union meeting and it came in the discussion and they decided that they should pay him after they had come into an argument with him about discrimination.

TRIAL EXAMINER: Do I understand you correctly to say that he was for a period there, he was a supervisor, but wasn't getting supervisory pay, is that what you said?

THE WITNESS: Yes, that's what I said. I did the same thing and I didn't get the title of it. This is how they worked.

Q (By Mr. Barton) And these other individuals did the same kind of work you did?
A Right.
Q Was a statement read at the press conference?
A Yes, it was.

TRIAL EXAMINER: A statement did you say?

MR. BARTON: Yes.

Q (By Mr. Barton) By whom?
A Jim Hollins.

Q Did you see the text of the statement?
A Yes, I did.
Q Can you recall pretty much what it said?
A It said that we were possibly going to hold a boycott of The Emporium.

MR. BAHRS: "We were what"?

[18] TRIAL EXAMINER: Possibly going to hold a boycott of The Emporium. Did you finish?

THE WITNESS: No. And it was stating that the Emporium had racist tactics and was treating black, brown, yellow and red people with discriminatory ways.

TRIAL EXAMINER: Would you read the last part of that answer?

(Record read)

TRIAL EXAMINER: Discriminatory what?

THE WITNESS: Ways.

Q (By Mr. Barton) What were you seeking?
A To try to talk to the top management to get better conditions for The Emporium.
Q How were you going to do this?
A Through group talk and through the president if we could talk to him.

TRIAL EXAMINER: I take it you are getting something that was said at a certain meeting?

MR. BARTON: That's right, at the press conference.

TRIAL EXAMINER: All right.

Q (By Mr. Barton) Were representatives of the press present?
A Yes.
Q Which ones?
A KTVU Channel 2, the Wall Street Journal and I think the Examiner.

[19] Q Was anything else said at the conference?
A No, we cut it short about ten minutes so we could answer questions and if the press asked us—
Q What?
A They just asked us questions that we answered that were strategic.
Q Did anyone criticize the company's merchandise?
A No.

Q Did anyone urge violence?
A No.
Q All right. Now, directing your attention to the Saturday, November 2nd, 1968, do you recall distributing leaflets near the Emporium?
A Yes, I do.
Q During what period of time?
A From the time it opened from 9:30 until 6:00 when it closed.
Q Were you supposed to be working at this time?
A No, I didn't.
Q What was the answer?
A No.
Q Why not?
A Because it was my day off.
Q Who was with you?
A Jim Hollins.
[20] Q Anyone else?
A Ron Epps, Carlton Washington.
Q Were they distributing leaflets too?
A Yes, they were.
TRIAL EXAMINER: There were four all together, is that right?
THE WITNESS: Yes.
Q (By Mr. Barton) Where were you located in relation to the entrance of the Emporium?
A On the side.
Q How wide is the sidewalk there, do you recall?
A Maybe about as wide as this room—I mean the sidewalk is—are you talking about the sidewalk?
Q Yes.
A The sidewalk is very narrow.
Q How wide is the entrance?
A About as wide as this room.
Q Did you notice anyone having any difficulty getting by you going in and out?
A I wasn't standing in the entrance way where they couldn't get by me.
MR. BARTON: Your Honor, I am marking for identification as General Counsel's Exhibit No. 3 what purports to be a leaflet entitled, "Beware Emporium Shoppers, Boycott is on."

(The document above referred to [21] was marked General Counsel's Exhibit 3 for identification.)

Q (By Mr. Barton) Mr. Hawkins, I will show you General Counsel's Exhibit 3 for identification and ask you if you can identify it?
A Yes.
Q What is it?
A This is the first leaflet we passed out on the first Saturday, on November 2.
MR. BARTON: I would offer this into evidence at this time.
MR. BAHRS: No objection.
TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 3 was received in evidence.)

Q (By Mr. Barton) Now, in distributing these leaflets on November 2, Mr. Hawkins, did you ever have occasion to raise your voice?
A Yes, I did.
Q When did this happen?
A When I had to—it was one of my policies of letting the people know and there was a crowd of people and there was always a lot of noise and so I couldn't talk softly and I wanted the people to be aware of what we were doing.
Q During the course of that day did you ever strike anyone?
[22] A No, I didn't.
Q Did you ever see any of your colleagues strike anyone?
A No.
Q Throw anything?
A No.
Q Did you urge anyone else to throw anything?
A No.
Q Did you curse or swear at anyone?
A On occasions.
Q When was this?

A This was when people couldn't respond respectfully to me and I couldn't basically destroy my respect and not say anything back to them.

Q What would they say to you?

A They would call me fictitious names.

Q What did they say?

A One lady called me a "nigger".

Q What did you say back?

A I said I was a "good nigger".

Q What else was said to you?

A I was called a, "Communist", and a lot of curse words.

Q And these were the remarks which you replied with curse words?

A Sometimes, yes, when I thought it was necessary.

Q Now, subsequent to your efforts on November 2, did anyone [23] from The Emporium ever speak to you about what you had been doing?

A Yes, they did.

Q Who was that?

A Mr. Ehrenfried.

Q Is that the person?

A Yes.

Q When did this occur?

A The dates are sort of weak in my mind.

Q How much after the leaflet—

A During the next week.

Q During the next week?

A Yes.

Q Who else was present at the time?

A If I recall it was Mr. Henderson, I am not for sure though.

Q Where were you located?

A In Mr. Ehrenfried's office.

Q What did he say?

A He told us about that we had a written warning about when we were distributing these leaflets and that we could be fired for it.

TRIAL EXAMINER: Read that back to me, Mr. Reporter.

(Record read)

Q (By Mr. Barton) Did he give you any document?

A Yes, he did.

[24] MR. BARTON: Your Honor, at this time I am going to mark as General Counsel's Exhibit 4 what purports to be a warning issued to Tom Hawkins.

(The document above referred to was marked General Counsel's Exhibit 4 for identification.)

Q (By Mr. Barton) I will show you, Mr. Hawkins, General Counsel's Exhibit 4 and ask you to identify it.

A Yes.

Q What is that?

A This is what Mr. Ehrenfried gave me when I went to his office and Mr. Ehrenfried is the one who was witnessing—

TRIAL EXAMINER: May I see a copy?

MR. BARTON: Yes, I am going to offer it at this time.

MR. BAHRS: No objection.

TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 4, was received in evidence.)

Q (By Mr. Barton) Now, subsequent to receiving warning, did you distribute any more leaflets?

A Yes, I did.

Q When did this happen?

A Saturday, November 9th.

Q The following Saturday?

A Yes.

Q During what period of time on this occasion?

[25] A From 9:30 until 6:00.

Q Was this during your regular working hours?

A No, it wasn't.

Q Why not?

A It was my off day.

Q Who else participated at this time?

A Jim Hollins and Ron Epps.

Q Where were you located?

A The front and back this time.

Q Incidentally, did Mr. Epps stay for the duration of the day, sir?
A No, he didn't, he left at about 3:00 o'clock.
Q Did Mr. Hollins stay?
A Yes.
TRIAL EXAMINER: Did the same leaflet that you had previously passed out?
THE WITNESS: There were some changes.
Q (By Mr. Barton) On this occasion where were you located in relation to the doorway?
A I was off on the side.
Q Did you notice anyone having any trouble getting by you in going in and out of the store?
A No.
MR. BARTON: Your Honor, at this time I am marking for identification as General Counsel's Exhibit No. 5 what purports [26] to be a leaflet entitled, "Emporium Shoppers".

(The document above referred to was marked General Counsel's Exhibit 5 for identification.)

Q (By Mr. Barton) Mr. Hawkins, I will show you General Counsel's Exhibit No. 5 for identification and ask you if you can identify that?
A Yes, I can.
Q What is that?
A The second leaflet that we had made up the following week.
Q Did you distribute that on that following day?
A Yes, we did.
MR. BARTON: I will offer that at this time.
TRIAL EXAMINER: Any objection?
MR. BAHRS: No objection.
TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 5, was received in evidence.)

Q (By Mr. Barton) Now, on this date did you raise your voice during that period?
A Yes, I did.

Q When did you raise your voice on these occasions?
A It comes in intervals like when I felt it was necessary to raise my voice so people could hear me when I would speak.
Q Did you ever strike anyone on November 9th?
A No, I didn't.
[27] Q Throw anything?
A No.
Q Urge anyone else to throw anything? Urge anyone else to do either?
A Beg your pardon?
Q Urge anyone else to do either? That is to strike anyone or throw anything?
A No.
Q Did you curse or swear at anyone on this particular day?
A Quite possibly I did, I can't remember.
Q On what occasions?
A When it was necessary.
Q For what purpose?
A To not lose my basic respect again so somebody else could respect me.
Q Subsequently to distributing leaflets the second time were you discharged by The Emporium?
A Yes, I was.
Q When did this happen?
A November 11th.
Q By whom?
A When I went to work I had a note that Mr. Ehrenfried wanted to see me. I went to his office.
Q When you went to the office what did Mr. Ehrenfried say?
A He had a paper, a discharge paper for me he wanted me to [28] sign.
MR. KINTZ: We had a little difficulty with the legibility with this exhibit.
MR. BARTON: I am marking for identification as General Counsel's Exhibit 6 what purports to be a discharge slip made out to Tom Hawkins.

(The document above referred to was marked General Counsel's Exhibit 6 for identification.)

Q (By Mr. Barton) I show you General Counsel's Exhibit 6 for identification and ask you if you can identify that?

A Yes, I can.

Q What is that?

A This is my discharge slip that they gave me when I was leaving the Emporium.

Q On that day?

A Yes.

MR. BARTON: I offer that at this time.

MR. BAHRS: No objection.

TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 6, was received in evidence.)

Q (By Mr. Barton) Well—

TRIAL EXAMINER: Is this the best that you can do on this exhibit?

MR. KINTZ: Yes. May I suggest that we read into the [29] record a stipulated statement of what it says?

TRIAL EXAMINER: I can read the first sentence very well, "You are being discharged today." Then it begins to get a little dim after that. If you can stipulate I think it might be helpful.

MR. KINTZ: May I suggest that I read what I believe it to say into the record and if Mr. Bahrs agrees or disagrees with me he can so express it?

TRIAL EXAMINER: All right.

MR. KINTZ: Well, we have reference to the legibility of the portion of the document marked, "Remarks". My reading is as follows: "You are being discharged today." "Distribution of 'Boycott Emporium' literature on Saturday, November 9th, 1968 in front of The Emporium, 835 Market Street, S.F. pursuant to written warning dated 11/7/68 for similar action on 11/2/68."

Is that correct, Mr. Bahrs?

MR. BAHRS: Yes.

TRIAL EXAMINER: Thank you.

MR. KINTZ: I propose a stipulation, Your Honor, that in case of any dispute of the remarks portion of

General Counsel's Exhibit 6 that the statement which I read into the record be designated as the contents thereof.

TRIAL EXAMINER: Is that satisfactory, Mr. Bahrs?

MR. BAHRS: That's satisfactory.

TRIAL EXAMINER: Mr. Hecht, you have nothing to say do you? [30] If you don't say something I assume that you so agree?

MR. HECHT: I will argue like the dickens if I don't.

I wonder if we could ask the Reporter to read back what was the portion stated in General Counsel's Exhibit 6 by the General Counsel?

TRIAL EXAMINER: Mr. Reporter, would you read it back please?

THE REPORTER: Yes, sir.

MR. BAHRS: First may we go off the record a moment?

TRIAL EXAMINER: Yes, off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

MR. HECHT: Could you read it back, Mr. Reporter?

THE REPORTER: Yes, sir.

(Record read)

MR. HECHT: Perfect.

TRIAL EXAMINER: You join in the stipulation, Mr. Hecht?

MR. HECHT: I surely do.

TRIAL EXAMINER: Very well.

Q (By Mr. Barton) All right, Mr. Hawkins, now on both occasions when you were distributing this, did you say anything regarding the quality of The Emporiums merchandise?

A No, I didn't.

Q About the quality of the service?

A No, I didn't.

• • • •

[32] Q (By Mr. Barton) Who made the decision to take this action against The Emporium?

A Ron Epps, Tom Hawkins, Jim Hollins and Carlton Washington, we all decided this would be the right procedure.

Q When did you make the decision?

A It was in a matter of weeks that we went through this [33] procedure of getting together that we would do this.

* * * *

[34] Q (By Mr. Barton) All right, Mr. Hawkins, in making your decision did you seek the opinion of the other minority employees at the Emporium?

A Yes, I did.

Q How did you go about this?

A We took a thorough investigation of non selling and selling areas of The Emporium, asking black, brown, yellow and red [35] people how they felt and what were the conditions and how we could have better conditions and not have lay offs in the middle part of the year when they called it a lower part of the year—

Q One moment. When did you go around asking people? When did this occur?

A During my break and lunch period.

TRIAL EXAMINER: That is before you distributed these pamphlets?

THE WITNESS: This was during the week when I was working at the Emporium.

Q (By Mr. Barton) Was it before the press conference?

A No, it was after the first press conference that we had, Mr. Barton.

Q How did you solicit the opinion of these other employees, what procedure did you employ?

A We had seven questions that we wrote down and we felt like we could answer them all to the people and asked the people how they felt and what would be their opinion about it and they would give us an answer and we would write it down.

TRIAL EXAMINER: Do you have the seven questions?

THE WITNESS: Mr. Hollins has.

MR. BARTON: My missing witness has.

TRIAL EXAMINER: Were they in writing?

THE WITNESS: Yes.

[36] TRIAL EXAMINER: With the answers in writing were they?

THE WITNESS: Yes, they were.

TRIAL EXAMINER: Now, you are getting towards something tangible that I think might be admissible if you have it.

MR. BARTON: When Mr. Hollins comes, as I say we hope to submit that, Your Honor.

TRIAL EXAMINER: By the way when you bring in the Tanner case—I have read it of course but not with any specific recollection as to the details. I want the Court's opinion as well and the remand. Will you bring it all in, that is if you want to put in this type of evidence?

MR. KINTZ: Yes, Your Honor.

TRIAL EXAMINER: All right.

Q (By Mr. Barton) When asking these questions of these employees, Mr. Hawkins, what was the response?

A It was all response that everybody had a basic grievance or basic complaint about how The Emporium was treating black, brown and yellow people and we wanted to get to the core of them and the purpose of the meeting, of talking to the President, was to try to get better conditions and this was the main purpose of it.

Q Just a minute.

A Let's take the questions one at a time.

TRIAL EXAMINER: Do we have any evidence about a talk with the President yet?

[37] MR. BARTON: Pardon?

TRIAL EXAMINER: Do we have any evidence yet with respect to any talk with the President?

MR. BARTON: No.

THE WITNESS: He refused to.

Q (By Mr. Barton) All right. Now, the employees with whom you spoke to in making your survey did you confine yourself to any department or—

A No, it was non selling and selling, we went all over.

TRIAL EXAMINER: In making this survey did you seek out any particular employees for any particular reason or was it just any employee?

THE WITNESS: We were seeking black, brown, yellow and red people because they were working at the lowest jobs and the lowest levels and this is what we had in the leaflet that we didn't put in the leaflet that they weren't in furniture, washing machines, TV and radio. We took the investigation to exploit black, brown, red and yellow people into these areas.

Q (By Mr. Barton) Now, had you taken this matter up with the union at any time?

A Yes, we had.

Q When did you do this?

A Early in April we made a grievance.

Q What year was that?

A That was in 1966 in April sometime.

[38] Q Who did you see—

TRIAL EXAMINER: I want that whole answer read back. I didn't get the way he uses the word grievance. Will you give me that answer back, Mr. Reporter?

THE REPORTER: Yes, sir.

(Record read)

TRIAL EXAMINER: You took up a grievance with the union, is that right?

THE WITNESS: Yes, this is what they call it as a formality.

TRIAL EXAMINER: All right.

Q (By Mr. Barton) You went to see who?

A The union representative, the Business Manager and Mr. Williams and Mr. Griffin, Johnson and Williams.

Q What happened on this occasion?

A As far as I'm concerned nothing, but as far as trying to get little changes, some changes came about, but as far as discrimination my part and my interest in it didn't come about.

Q Did the union hold a meeting?

A Yes, they did.

Q When was this?

A This was April the 4th if I remember.

Q What happened at that meeting?

A This was when they were discussing everything and they made a report on this that we had legitimate grievances on [39] discrimination and they were seeking to better the conditions.

TRIAL EXAMINER: The union made such a report?

THE WITNESS: Yes.

TRIAL EXAMINER: Do you have that report?

MR. BARTON: Yes, I am going to offer it. I have lost track of our exhibit numbers.

MR. KINTZ: Seven.

MR. BARTON: Seven?

MR. KINTZ: Yes.

MR. BARTON: At this time I am marking for identification General Counsel's Exhibit 7 which purports to be a copy of the report made by the union regarding the stock and marking areas at the Emporium.

(The document above referred to was marked General Counsel's Exhibit 7 for identification.)

Q (By Mr. Barton) I will show you General Counsel's Exhibit 7 and ask you if you can identify that?

A Yes, this is the report.

Q When did you see that report first?

A I can't remember the date that I have seen it, but Mr. Young showed it to me I think and then we went down and got a copy after months and months later.

Q You got a copy prior to the press conference?

A Yes—no, just before that's right it was before. We were preparing for it.

[40] MR. BARTON: I offer this into evidence at this time.

MR. BAHRS: Excuse me may I have the last question and answer read back please?

TRIAL EXAMINER: Yes, read it back, Mr. Reporter.

(Record read)

MR. BAHRS: Thank you.

TRIAL EXAMINER: You have an objection to the receipt of this?

MR. BAHRS: No objection.
TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 7 was received in evidence.)

Q (By Mr. Barton) When you went down to pick this up, who was with you, Mr. Hawkins?
A Carlton Washington.
Q Anyone else?
A No.
Q Were you ever present when either Mr. Hollins or Mr. Epps saw this document?
A We all saw it.
Q Do you know if the union filed a grievance regarding racial discrimination at The Emporium?
A I wouldn't swear to it.
TRIAL EXAMINER: In other words, you don't know if that was the fact?
[41] THE WITNESS: No, that was between them, I could not say.
TRIAL EXAMINER: He couldn't swear to it.
MR. BAHRS: I see.
TRIAL EXAMINER: Would you develop what this report says or what was done with it? I don't know what significance the report is unless it was shown to somebody.
MR. BARTON: I believe it is in the record that they did receive it and went down and picked up a copy and read it, the individual.
TRIAL EXAMINER: I see. Was it served on the company?
THE WITNESS: It was supposed to have been by the union. This is their report so evidently they supposedly turned it into the Emporium and as a result we didn't get any action from it until August.
TRIAL EXAMINER: My question was did the company ever see the report, do you know?
THE WITNESS: I have no knowledge.
TRIAL EXAMINER: All right.

MR. BARTON: The purpose again is to establish a reasonable basis.
TRIAL EXAMINER: I understand it, yes.
Q (By Mr. Barton) Was there a meeting of the adjustment board regarding a grievance filed by the union?
A Yes, there was.
Q Did you attend?
A Yes, I did.
[42] Q Did any of your—Mr. Hollins, Mr. Epps and Mr. Washington, were they with you?
A Yes, they were.
Q Did you present your case at that time?
A No, the union was supposed to represent us, we had prepared a statement to make that we weren't going to speak as individuals, we were speaking as a group and Mr. Hollins made this statement and after this statement the council was sort of shocked and surprised that we had made such a statement and that we just, after they had made their statement, we walked out.
TRIAL EXAMINER: Who was council?
THE WITNESS: Mr. Brown, Mr. Garrett and somebody else was there, the three man panel that you talk to to try to settle this thing, the matter of discrimination.
Q (By Mr. Barton) When was this made?
A I think it was in October.
TRIAL EXAMINER: Would you develop whether this was a management panel or was it the—what was the identity of the panel?
MR. BARTON: In the collective bargaining agreement it was an adjustment—
MR. BAHRS: It was an adjustment board constituted under Joint Exhibit No. 2 and there were three representatives and three representatives of the San Francisco Retailers Council [43] which is the collective bargaining representatives for the multi employer group including The Emporium and we will stipulate to that.
TRIAL EXAMINER: Do you accept the stipulation?
MR. BARTON: Yes.
TRIAL EXAMINER: Mr. Hecht?

MR. HECHT: I have no knowledge. I don't oppose the stipulation.

TRIAL EXAMINER: Did you get a date on when this grievance was presented?

MR. BARTON: He said something in October.

MR. BAHRS: We will offer a stipulation as to October 18.

MR. HECHT: So stipulated.

MR. BAHRS: Do you so stipulate?

MR. BARTON: So stipulated. We have no further questions.

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[45] CROSS-EXAMINATION

Q (By Mr. Hecht) Mr. Hawkins, before you started leafleting and before you held the press conference, did you attempt to adjust what you saw as a grievance through your union?

A Yes, we did.

Q Why did you not continue through the union?

A Because the union was sort of putting us off and on and was going into a lot of delay that we felt was unnecessary.

Q What sort of delays?

A Well, saying that there would be changes and when we finally met for this change we were going through a process where we had our own representation coming at this meeting [46] that they gave in late August that they got sort of upset about it because we were bringing something else in.

Q Who were you bringing in?

A Tomatu Scott.

Q From the Economic Opportunity Council in San Francisco?

A Yes.

Q Why did you bring him in?

A Because I felt like as being a black man he would know the problem of when you say discrimination because he had dealt with it before.

Q Was he to represent you, Mr. Hawkins? Or to represent all black people?

A Brown and yellow and red people.

Q Black, yellow, brown and red?

A Yes.

Q Was the union agreeable to having the grievance presented by all black, yellow, brown, red people together?

A Yes, they were. The sense was that they wanted to do something, but they wanted to go through the procedure of this retailers counciling and it was going to be individually when it came about when we were still talking group matters.

Q It was still going to be handled individually?

A Right, it was individual persons that would say something and on their behalf they would take it into consideration instead of a group matter that we were talking about.

[47] Q Was this way of proceeding that the union seemed to want to follow acceptable to you?

A No, it wasn't.

Q Why not?

A Because we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few. Like Mr. Young, he was the only one that really got something out of the deal, he got a promotion.

Q Were there more than just a few people who had a grievance?

A There was a lot of brown, yellow and black people and red people that had a lot of grievances on conditions.

Q Is it a fair statement of what you are saying that it was your feeling that if the union handled the matter the way the union seemed to be handling the agreements would not be satisfactorily taken care of?

A No.

MR. HECHT: I think that is all I have.

TRIAL EXAMINER: I am sure the answer no is not what you expected, Mr. Hecht.

MR. HECHT: What came after that word explains it.

TRIAL EXAMINER: If you are satisfied why—are you finished?

MR. HECHT: I am unless if you think there is some confusion on that answer.

TRIAL EXAMINER: I think the answer was contrary to what [48] the witness intended to say, he said, "No".

MR. HECHT: Will you read the question and answer back, Mr. Reporter?

(Record read)

TRIAL EXAMINER: Did you intend to give that answer?

THE WITNESS: Let me think about the question myself.

MR. HECHT: I want to know if I could restate the question?

TRIAL EXAMINER: Surely.

Q (By Mr. Hecht) Let's try it this way. Was your understanding that the union was going to resolve this grievance as a group matter for all black, brown, yellow, red people or not?

A No, they weren't going to do this, it was an individual thing that they were trying.

MR. HECHT: Thank you, that's all.

TRIAL EXAMINER: Cross-examination, Mr. Bahrs?

MR. BAHRS: Yes.

Q (By Mr. Bahrs) Mr. Hawkins, did you ever present a grievance to The Emporium?

A Well, we tried to do it to the President. Mr. Hollins was going up to do it and the President got furious and wouldn't talk to us.

Q Did you ever try to present it?

A No.

Q You did not, right?

[49] A No.

Q You did however present a grievance to the union, is that right?

A Yes, we did.

Q This was in May was it or April?

A This was in April, yes.

Q Now, do you know whether following that meeting in April the union submitted a document to The Emporium that has been received in evidence as General Counsel's Exhibit No. 7? Do you know whether The Emporium ever got a copy of that document?

A Like I said I didn't have any knowledge of it.

Q You did say that there were some adjustments made, isn't that right, following this meeting in April?

A Yes, there was.

Q That the union had succeeded in having The Emporium make some adjustments on behalf of some minority employees?

A I would say minority employees exploited it out.

Q What was the answer?

A It could have been exploited out where you could have an Italian person but we wanted to have people like black people—

MR. BAHRS: I want the answer to be stricken as not responsive.

THE WITNESS: Well, I am trying.

Q (By Mr. Bahrs) Listen, sir, would you please listen to [50] the question?

A Yes.

TRIAL EXAMINER: Do you want it repeated?

MR. BAHRS: I will repeat it.

Q (By Mr. Bahrs) Do you know whether The Emporium made any adjustments for employees belonging to minority groups following this document at this meeting where General Counsel 7 was presented to employees?

MR. HECHT: I will object to the question.

TRIAL EXAMINER: This document has been put into evidence on direct examination and it is relevant. The question is relevant in the first place and he may answer.

THE WITNESS: I would like to point out something that is in the report.

MR. BAHRS: If Your Honor please I am going to object—

TRIAL EXAMINER: He asked you if any adjustments were made by the company with respect to mi-

nority groups after this particular document was published. Do you know if you know or don't you know?

THE WITNESS: No, I don't.

Q (By Mr. Bahrs) You testified on direct examination, didn't you that some people got raises?

A Raises?

Q You know what a raise is don't you?

A I know what a raise is but I am talking about who you are [51] talking about got a raise.

Q I am asking you who you are talking about. Didn't you testify that some people got improvements following the meeting?

A I was talking about like women got to wear slacks to work for instance. As far as black, brown, yellow, red people, they didn't get any—

Q How about a person getting promotion to a supervisor, didn't you testify to that in your direct examination?

A I said we were talking about promotion, like Russell Young, this was our main thing. As far as black people were going in, this is our first thing. This was a point that everybody was bringing up. It was whites, yellows, reds, everybody was bringing it up.

MR. BAHRS: I am going to ask that the answer be stricken.

THE WITNESS: This is the way I am explaining it to you and if you don't understand, this is the first report we gave out.

Q (By Mr. Bahrs) Which is the first report that you gave out?

A This was the first report.

Q When you are referring to this report will you please tell us what document you are referring to?

A This is the first one.

MR. KINTZ: General Counsel's Exhibit No. 7 that you have [52] reference to, is that it?

THE WITNESS: That is what I am talking about. That is the one we were just talking about Negroes, we weren't talking about brown, yellow, or red people, just Negroes.

Q (By Mr. Bahrs) I am asking you after that document was presented to The Emporium by the union, did The Emporium make any promotions of Negroes?

A Not to my knowledge.

TRIAL EXAMINER: If you know.

THE WITNESS: Not to my knowledge.

Q (By Mr. Bahrs) You do not know, right?

A I can not remember.

Q Did you testify on your direct examination about somebody being a supervisor?

A Mr. Reese, I believe I said.

TRIAL EXAMINER: I think he probably had reference to your testimony in respect of somebody who wasn't getting supervisory pay.

THE WITNESS: Mr. Hollins didn't have the badge nor was he getting until they had made—and this was late in the year, around Christmas and the other supervisor got sick.

TRIAL EXAMINER: You mean he got the raise in pay late in the year?

THE WITNESS: Right. They decided—Mr. Young was the assistant manager. They had talked it over with the personnel [53] and I guess they said that he should get the money, but he did not get the badge, he was just taking the supervisors place because he knew the area but as far as the title, this has never been really what negroes really had except very few and it was just pressure put upon him, not enlightened to him.

MR. KINTZ: I believe the record would be clarified if I can be allowed to observe that the witness on direct examination said on several occasions he didn't know when the union served General Counsel's Exhibit 7 on The Emporium or if they served it upon them which is one of the problems which introduces complication and why I objected to the original question about what happened after it because he doesn't know when.

TRIAL EXAMINER: The witness testified that he didn't even know it was served on the Respondent. I don't know why that really rules out the line of examination, however.

Q (By Mr. Bahrs) Do you know an employee by the name of Young?

A Yes.

Q Do you know whether or not he was promoted to a supervisor?

A Yes, he was.

Q Do you know when that took place?

A Not the specific date.

Q I beg your pardon?

A I don't know the specific date.

[54] Q Was it before or after you had the meeting with the union at which you stated your grievances?

A I think it was after.

Q Do you know a man by the name of Fata, F-a-t-a?

A Yes.

Q Was he promoted to a supervisor?

A Yes, he was.

Q Was this after you had your meeting at which—

A Yes, it was.

Q And were Young and Fata a part of the complainants that appeared before the union and asked—

A That's right.

Q Is that right?

A Right.

Q Okay. Now, you testified that you conducted—excuse me I will withdraw that.

Did the union also inform you that they were going to appear on your behalf with the Emporium and seek to improve your conditions of employment?

A You mean individually?

Q Yes.

A I never talked on an individual basis. I told them that—

TRIAL EXAMINER: I take it your answer is no that they never did?

THE WITNESS: No, right.

[55] Q (By Mr. Bahrs) You appeared before the union and asked the union to do what, sir?

A We were talking about brown, yellow and red people, black too.

Q Were you asking the union to appear before the San Francisco Retailers Council on behalf of all brown, red, yellow people?

A We were trying to represent them.

Q You were trying to represent them?

A All of us as a group, yes. We even asked Filipinos, anybody that wanted to come to the meeting we wanted to have come. They wanted us to individually go and bring them. We did not speak individually, we spoke as a group.

TRIAL EXAMINER: You spoke to the union as a group?

THE WITNESS: Right, we spoke to the union as a group.

Q (By Mr. Bahrs) Is this correct that the union offered to represent each one of the brown, red, yellow and black employees of The Emporium individually?

A This is what they wanted.

Q But that you refused to accept the union's representation on that basis, is that correct?

A On an individual basis, that's correct.

Q Now, do you know whether or not an adjustment board meeting was held on October 16, 1968?

A Yes, it was.

Q Do you know who appeared there with grievances?

[56] A No, because I didn't go.

Q You did not go?

A No.

Q You don't know what happened there, right?

A Through somebody telling what happened, but as far as facts, no.

TRIAL EXAMINER: Can we have a stipulation on what constituted the adjustment board?

MR. KINTZ: I had hoped we did.

TRIAL EXAMINER: I think perhaps we did. It skipped my mind.

MR. BAHRS: The Joint Exhibit No. 2 provides an adjustment Board in section—

MR. KINTZ: I am prepared to stipulate that we are talking about here, what we are talking about here is a board convening in pursuance to the agreement too.

TRIAL EXAMINER: I want to be able to understand it.

MR. BAHRS: Section 36 of Joint Exhibit No. 2, page 16.

TRIAL EXAMINER: That will be entirely satisfactory. I can now understand it as we go along.

Q (By Mr. Bahrs) On the afternoon of October 16 did you have a meeting or did you participate in a meeting with some representatives of the union?

A On October 16?

Q Yes.

[57] A The only time I saw Mr. Griffith and Mr. Williams was when they came on my job when I running the elevator and they were speaking to me sort of boisterously.

Q They were speaking to you sort of boisterously?

A Yes.

Q Telling you what? Tell us what the conversation was?

A It was why didn't I come to the meeting?

Q What meeting were they referring to?

A The Retailers Council meeting.

Q The Retailers Council meeting?

A Yes, I guess so.

TRIAL EXAMINER: Were you by yourself, addressing you personally was it?

THE WITNESS: Right.

Q (By Mr. Bahrs) Who was present now, you say Mr—.

A Mr. Williams and Mr. Griffith I believe.

Q Was that all the conversation that took place, "Why didn't you go to the meeting"?

A No, that wasn't all. They took me up to Mr. Graff's office and Mr. Ehrenfried was with them and present.

Q Tell us what was said?

A They were asking me why I didn't go and my reason and Mr. Ehrenfried—and I refused to talk and I felt that because Mr. Ehrenfried was present and sort of listening to our arguments or disagreements of why I

didn't do something, go [58] to the meeting, I felt like I didn't want to do this, I know.

Q All right. Now, this conversation took place on the 16th, is that right?

A Yes.

Q Did you appear at the meeting on the adjustment board on the 18th?

A Yes, I did, we did.

Q Did anybody accompany you, sir?

A Yes.

Q Tell us please who they were?

A Hollins, Epps, Washington and myself.

Q And will you tell us what took place at that meeting?

A Mr. Hollins made a statement that we were not going to speak at this meeting as individuals, we were speaking as a group and our main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of The Emporium.

Q Isn't it a fact that Mr. Hollins said that the group of four was not going to settle this through the union, that they would talk directly to the President of The Emporium or no one, is that right?

A This is what we wanted to do.

TRIAL EXAMINER: What we want to get at is what was said.

THE WITNESS: I can not tell you word for word.

TRIAL EXAMINER: I don't mean word for word. Did they [59] say that in substance?

THE WITNESS: Beg your pardon?

TRIAL EXAMINER: Did they say that in substance what you just stated?

Read his last answer back, Mr. Reporter.

(Record read)

TRIAL EXAMINER: Thank you.

Q (By Mr. Bahrs) Is it correct to say that you refused to proceed through the adjustment board with the union representing you and you insisted on talking directly to the President of The Emporium, is that correct?

MR. KINTZ Objection.

TRIAL EXAMINER: Break it down.

Q (By Mr. Bahrs) Is it correct to say that Mr. Hollins made the statement on behalf of the four of you that you would not go ahead with Adjustment Board at which time you were represented by the union, is that correct?

A Yes.

MR. HECHT: I would like to lodge an objection to that question as well as the line of questioning, I ask that the line of questioning be stricken. I am sorry I didn't speak earlier. I have been refining the objection in my mind and I would like to state it for the record if I may.

TRIAL EXAMINER: You may.

MR. HECHT: Which is that whatever this witness did or [60] didn't do with regard to his union in order to adjust what he saw as a grievance is of no relevance to the case, that the Board law makes it clear that when employees act in a fashion which is not inimical to the collective bargaining agreement, that they are performing a concerted, protected activity and that what is relevant and what is solely relevant to this proceeding is the activity that Mr. Hawkins engaged in which was fated to be the sole reason for his discharge and that is to say the leafleting.

TRIAL EXAMINER: I am unable to agree. I will overrule the objection.

Q (By Mr. Bahrs) Mr. Hawkins, did Mr. Hollins—at that meeting also state that the group of four of you wanted to talk to the President of The Emporium and wouldn't talk to anybody else, is that right?

A Yes.

Q Well—

TRIAL EXAMINER: To explain my ruling, Mr. Hecht, you have got a phrase, "Inimical" in there that we will have to construe and take the fact on. All of this is quite relevant to the phrase, "Inimical".

MR. BAHRS: Are you through?

TRIAL EXAMINER: Yes.

Q (By Mr. Bahrs) Now, on October 22, I believe you testified that you held a press conference?

[61] A Yes.

Q Is that right?

A Yes.

Q And that you made a statement—was this what was broadcasted by radio and TV?

A TV.

Q TV?

A Yes.

Q Right?

A Yes.

Q Now, I will ask you to examine the text of the leaflets that you handed out, General Counsel's Exhibits No. 3 and No. 5 and ask you whether the statements that were broadcast by TV on the 22nd were in substantially the same language as appears on these two leaflets, is that right?

A Approximately.

MR. KINTZ: I object to this as being immaterial. There is no question in the record that the witness distributed the leaflets, he said he made a statement substantially identical to the contents of one of the leaflets. It seems to me to be totally immaterial whether the television station broadcasted it or not.

TRIAL EXAMINER: What you are saying as a matter of fact is the number of times these statements and the circumstances under which they were distributed other than the distribution [62] to the public of the pamphlets themselves are immaterial?

MR. KINTZ: Correct.

TRIAL EXAMINER: I don't see any objection to having it in the record. Did you broadcast the substance of the statements on your pamphlets?

THE WITNESS: Right.

MR. BAHRS: Well, I believe that the witness has testified the text of the statement that was broadcast is substantially the same as the leaflets, is that right?

TRIAL EXAMINER: That is what I understand.

Now, I suppose it can be argued that this also goes to the reasonableness or unreasonableness. Anyhow, it is in.

MR. BAHRS: That's right.

Q (By Mr. Bahrs) Mr. Hawkins, in the week of October 22, were you employed by The Emporium?

A October 22?

Q Yes.

A Yes, I was.

Q Were you paid for working that week?

A That whole week?

Q Or any part of that week?

A Well, I didn't work 40 hours. I was off on October 22 a half day.

Q But were you paid for working sometime during that week in which you made the broadcast, in which the broadcast was [63] made?

MR. KINTZ: So stipulated.

MR. BAHRS: Will it be stipulated that the witness was also an employee and was paid for the week or weeks in which the leaflets were handed out?

MR. KINTZ: So stipulated.

TRIAL EXAMINER: If you don't say something, Mr. Hecht, I will assume that you agree with the General Counsel and will join in the stipulation?

MR. HECHT: So stipulated.

TRIAL EXAMINER: If you object, you have to speak up.

MR. HECHT: Thank you.

MR. BAHRS: Will it be stipulated also that the leaflets were handed out on November 16 and 23 and December 7?

MR. HECHT: That will not be stipulated to.

MR. BARTON: That is subsequent to the discharge.

TRIAL EXAMINER: There is no stipulation anyhow. Mr. Hecht won't stipulate so—

Q (By Mr. Bahrs) Mr. Hawkins, did you hand out any leaflets on or about November 9 of last year?

A Yes.

TRIAL EXAMINER: You remember the date?

THE WITNESS: Yes, it was a Saturday, November 9.

Q (By Mr. Bahrs) I beg your pardon?

A A Saturday, November 9.

[64] Q Did you hand out any leaflets on November 16?

MR. BARTON: I object to that as being irrelevant. That was subsequent to the discharge.

MR. HECHT: We join in that. We join in that objection.

MR. BAHRS: An accumulative course of action has some bearing on the Witness's right to reinstatement. We admit it.

TRIAL EXAMINER: I don't pass on the probative weight of this, but I don't see any reason why we can't have the dates that the leaflets were passed out. This is a matter of sequence. I think you should show him a calendar.

THE WITNESS: I know the dates.

TRIAL EXAMINER: Do you?

THE WITNESS: Yes.

TRIAL EXAMINER: Was that one of the days that you passed out leaflets?

THE WITNESS: Yes.

Q (By Mr. Bahrs) Did you also pass out leaflets the following date?

MR. HECHT: Same objection.

TRIAL EXAMINER: You may answer, overruled.

THE WITNESS: No.

Q (By Mr. Bahrs) On November 23?

A No.

Q I beg your pardon?

[65] A No, not on November 23.

Q Did you hand out any leaflets on December 7?

MR. HECHT: Same objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: No.

Q (By Mr. Bahrs) Did you hand out any leaflets at any time after November 16?

A No.

MR. BAHRS: I think that is all.

TRIAL EXAMINER: Redirect?

MR. HECHT: Nothing.
MR. KINTZ: Just a moment.
TRIAL EXAMINER: Surely.
MR. BARTON: We have no other questions. We perhaps might want to call him at a later time.
TRIAL EXAMINER: Finish your redirect. You can always call a rebuttal witness.
MR. BARTON: That is what we were talking about. Otherwise we are satisfied.
TRIAL EXAMINER: You are finished with him except for rebuttal?
MR. BARTON: Yes.
TRIAL EXAMINER: You are excused then, sir.

[67] * * * *

JAMES JOSEPH HOLLINS

was called as a witness by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat.

DIRECT EXAMINATION

Q (By Mr. Kintz) State your full name, sir.
A Jim Joseph Hollins.
Q Hollins, H-o-l-l-i-n-s?
A Yes, sir.
Q Where do you live, sir?
A 501 Capp Street.
Q Have you ever been employed by The Emporium, the Respondent in this proceeding?
A Yes, I have.
Q From when till when?
A From—to be exact from November of 1967 until November [68] of 1968.
Q At which location was this you were employed, sir?
A 835 Market.
Q Yes. All right. Did you ever work anyplace else for The Emporium?
A No.

Q What was your position when you started?
A Stock clerk.
Q And when you were stock clerk what were your duties?
A My duties were to carry trucks to the floor, unload them, bring them back and after I was finished with that I worked on either the fourth, the third or second or first floor unloading merchandise on either of those floors.
Q Now, when you have reference to a truck, sir, you have reference to a hand truck, something a person pushes?
A Yes, uh huh.
Q How were you paid, hourly or monthly or—
A Hourly.
Q What was your hourly wage rate when you started?
A $2.25.
Q Were you when you were performing as a stock clerk assigned to any specific area or department?
A Nowhere. Well, let's see. Not specifically because when I first started I would float around and I would work in different places and like for the first few months that I was [69] working, I didn't have any specific area that I worked in.
Q Who told you where to work?
A It would be either Mr. Graff, Mr. Holiday or Mr. Pete Babbs.
Q Would you tell me what each of their titles was?
A Mr. Graff was the manager, Mr. Holiday was the assistant manager and Mr. Babbs was the second assistant manager.
Q Now, at that time if you wanted to take a day off, the following day, who would you ask for time off?
A I would ask Mr. Graff, either Mr. Holiday or Mr. Babbs.
Q If you were sick while you were at work and you had to go home, who would you tell?
A Mr. Graff, Mr. Holiday or Mr. Babbs.
Q If you became sick at home and couldn't come to work the following day who would you contact?
A I would call the medical department.
Q The medical department?

A Yes.
Q At any time while you were employed by the Emporium did you have any conferences or personnel conferences to discuss your work?
A Yes, I did.
Q How many?
A Three.
Q Do you remember when the first one was?
[70] A The first one was in December, no January of 1968.
Q Where did this take place?
A It took place in Mr. Graff's office.
Q Who was present there?
A Mr. Graff, Mr. Holiday, Mr.—I can't think of the other guys name.
Q What was his position, the one you can't think of?
A He was the assistant to Mr. Graff.
Q Now, you said there were three and the second one, about when was the second such meeting?
A The second was in January, February, March—I think it was in March.
Q Who was present on that occasion?
A Mr. Graff, Mr. Holiday and Mr. Babbs.
Q And the third one, when was that, sir?
A The third one was in October of 1968.
Q Who was present then?
A Mr. Squires, Mr. Graff and Mr. Young, Mr. Babbs and those were all the people that were present.
Q Where did these last two conferences take place, the same office?
A Yes, Mr. Graff's office.
Q Did you receive any written ratings or evaluations at any time while you were employed there?
A Yes, I did.
[71] Q How many?
A One.
Q Who gave it to you?
A Mr. Holiday.
Q Did it indicate on that written rating by whom it was prepared?
A Yes, it did.

Q Who prepared it?
A Mr. Holiday.
Q Calling your attention to October 1968 was there any change in your employment status at that time?
A Yes, there was.
Q What was that change?
A I was made a temporary supervisor.
Q Describe for us how that came about?
A The regular supervisor became ill and he had to be absent for a period of time for an operation, Ted Kasemrick?
Q K-a-s-e-m-r-i-c-k?
A Yes.
Q That's close anyway?
A Yes.
Q He became ill and he had to have an operation?
A Yes.
Q Tell us how this came to your attention?
A Well, Mr. Young came to me first and asked me would I [72] like to take the position of temporary supervisor during the time that he was absent and at first I declined the position because I had been passed over before several times for the position of supervisor.
Q Did you tell Mr. Young that?
A Yes, I did.
Q Go on and tell us what was said.
A He decided that he would go back in and tell Mr. Babbs about what I said about the reason of my not wanting to take the position of temporary supervisor and then he came back later on, so did Mr. Graff with Mr. Young and we discussed the whole thing. The thing of the extra money that was involved and I needed it because I wanted to go to school, so I told Mr. Graff that I would take the position, but it would only be on a temporary basis and I told him the reason why I felt like that was the same reason that I stated to Mr. Young.
Q Was there any discussion as to when the temporary position would end?
A Yes, Mr. Graff told me that it would end right after—well as soon as Ted came back.
MR. BAHRS: As soon as who?

MR. KINTZ: As soon as Ted came back is what you said?

THE WITNESS: Yes.

Q (By Mr. Kintz) Had you at any time had conversations concerning a permanent supervisory position?

[73] A Yes, I did.

Q When was that?

A That was about two weeks after I took a temporary position.

Q Who participated in this conversation?

A Mr. Graff and Mr. Young.

Q And you?

A And myself.

Q Where did this take place?

A This took place in Mr. Graff's office.

Q What was said on this occasion?

A It was just said that—well, he thought that I was a very suited person for the job of being a supervisor.

Q Who is he?

A Mr. Graff.

Q Okay.

A And Mr. Graff said that he would like for me to keep the job of supervisor permanently and I told him that I still felt the same way that I stated to him and Mr. Young previously about the thing that had happened between me and them as far as taking a supervisors job and being passed over and I told them I did not want the job.

Q Turning in your mind, Mr. Hollins, if you will, to the period in which you were holding this position of temporary supervisor which began sometime in October, is that right?

A Yes.

[74] Q Do you recall the date?

A No, I can't recall the date.

Q Now, you have told us what your duties were before you became a temporary supervisor. Tell us how, if at all, your duties differed when you became a temporary supervisor.

A I had the responsibility of seeing to it that the entire third floor in which I was a supervisor and that

all the people working in the third floor marking area besides the people who were working in marking area, in receiving, who were under another department, but other than that I had to see that all these people kept the merchandise coming in and going out and correctly sent out and that the merchandise that was being sent out, that it was all correctly there, and, you know, was promptly accounted for.

Q At the time you were a temporary supervisor did you continue to do any of the duties you used to do before?

A Yes, I did.

Q What percentage of your time did you work at actually moving the merchandise yourself after you became a temporary supervisor?

A I would say anywhere from 70 to 80 percent of my time.

[75] • • • •

Q (By Mr. Kintz) When was the last day on which you were employed by The Emporium?

A The last date I was employed by The Emporium was in [76] November, November 11—the 9, November 9.

Q Well, we will return to that in a moment.

MR. BAHRS: I will stipulate to the date.

MR. KINTZ: What is the date?

MR. BAHRS: The 11th. The 9th was the date you put out the handbills. You were fired the following Monday morning.

THE WITNESS: I was fired the following Monday which was the 11th, so the last day I worked was the 9th.

MR. HAWKINS: Actually the 8th.

THE WITNESS: Yes.

MR. KINTZ: You correct me, Mr. Hawkins. Thank you.

Q (By Mr. Kintz) Directing your attention to the second of November 1968, did you distribute leaflets in front of The Emporium on that date?

A Yes.

Q Well—

A What date was that again?

Q November 2?
A Yes, I did.
TRIAL EXAMINER: I will assume that this isn't in dispute that he distributed circulars on certain dates, you can stipulate.
MR. KINTZ: Yes.
MR. BAHRS: General Counsel's 3 and 5?
MR. KINTZ: Yes.
[77] MR. BAHRS: We will stipulate.
MR. KINTZ: We will stipulate on November 2 he distributed General Counsel's 3.
MR. BAHRS: Yes.
MR. KINTZ: And that subsequently on November 9 he distributed General Counsel's 5.
MR. BAHRS: Right.
MR. KINTZ: Right.
TRIAL EXAMINER: Do you want to stipulate where he distributed it?
MR. KINTZ: Maybe we ought to bring that out.
MR. BAHRS: On the sidewalk in front of one of the regular entrances of The Emporium.
MR. KINTZ: That is not entirely complete. Maybe I had better ask. I appreciate the offer.
MR. BAHRS: All right.
Q (By Mr. Kintz) Calling your attention to November 2 when you distributed leaflets during what period of time did you distribute it?
A It was from 9:30 until 6:00 o'clock p.m.
Q Where did you distribute them specifically that day?
A The main entrance in front of The Emporium.
Q Were you alone or with someone else?
A I was alone in the specific area that I am speaking of now.
[78] Q Did you observe any other persons distributing any leaflets on that day?
A Yes, I did.
Q Who?
A Myself, Mr. Hawkins, Mr. Epps, Mr. Washington and another young lady who works there, I can't think of her name.

Q Where in relation to the entrance of The Emporium were you distributing leaflets on the 2nd?
A On the 2nd?
Q Yes. November 2nd.
A Main entrance.
Q Where abouts in relation to the main entrance on which side as you face it?
A The front, right in the middle, around the middle entrance right in front of the store.
TRIAL EXAMINER: Facing Market Street?
THE WITNESS: Yes, facing Market Street.
Q (By Mr. Kintz) Were you scheduled to work on that day, by the way?
A No, I wasn't.
Q Did you notice anyone having any difficulty entering?
A No.
Q Getting by you in distributing leaflets?
A No, I didn't notice.
Q Did you have any conversations with any passers-by or [79] customers on that day?
A Yes, I did.
Q Did you at any time raise your voice?
A Once.
Q What was the occasion for that?
A Well, a lady approached me and asked me why don't I go back to Africa and she was walking out and she was going fast and I told her, I shouted, "I would go if she would give me the money."
Q At any time while you were there distributing leaflets, did you use any obscene or foul language?
A No, I didn't.
Q At any time while you were out there distributing leaflets did you advocate or participate in any violence?
A No.
Q Now, prior to the distribution of the leaflets, which is General Counsel's Exhibit No. 3 in evidence in this proceeding, did you have occasion to release it or similar material to news media?
A Yes, I did.
Q When was that?

A I can't remember.
Q All right. Approximately how long before you distributed the leaflet did it happen?
A It was the Tuesday before the Saturday that I distributed [80] the leaflet.
Q Where did this happen?
A It took place at the newspaper—
Q The Sun-Reporter?
A Yes.
Q Who was present there on that occasion?
A KDIA radio, Channel 2, Channel 4, myself, Mr. Hawkins, Mr. Epps, Mr. Washington and, who else was there? There was somebody there from The Emporium too, I believe.
Q Tell us what occurred. What was said on this occasion?
A We were asked—
Q Who asked you?
A People from Channel 2, Channel 4 and KDIA, they asked us why we were planning on boycotting The Emporium for what reasons and we explained it to them and we read the leaflet to them. We gave a general statement of what we were planning on doing and why.
Q What did you say you were planning on doing and why?
A We were planning on leafleting and boycotting the store because we felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was concerned.
TRIAL EXAMINER: Off the record.

(Discussion off the record)

TRIAL EXAMINER: Back on the record.
[81] Q (By Mr. Kintz) Did you finish your answer?
A Yes, I did.
Q Did you at any time during the course of this conversation criticize The Emporium's products or services to their customers?
A No.
Q At any time during this news conference did you urge violence?

A No.
Q Did you use any vile or obscene language during this news conference?
A No.
Q After you had this news conference, distributed these leaflets, did anyone from The Emporium discuss the matter with you?
A Yes, Mr. Ehrenfried did.
Q When was this?
A This was the following Thursday after the 2nd, so that would make it—
MR. KINTZ: Here, George.
MR. BAHRS: Thank you.
Q (By Mr. Kintz) Where did this occur?
A This occurred in Mr. Ehrenfried's office.
Q Who was present there?
A Myself, Mr. Ehrenfried and one of his secretaries.
[82] MR. KINTZ: May the record reflect, Your Honor, I am now showing the witness a document which I have marked as General Counsel's 8 for identification purporting to be directed to the witness from the Respondent in this proceeding.

(The document above referred to was marked General Counsel's Exhibit 8 for identification.)

Q (By Mr. Kintz) I now show you General Counsel's 8 for identification, Mr. Hollins, and ask you if you have ever seen that document before?
A Yes, I have.
Q Can you tell us what it is?
A This was issued as a warning, you know, not to participate.
Q When did you get it?
A When did I get it?
Q Yes.
A The 7th.
Q Was this document given to you at the meeting that you just mentioned with Mr. Ehrenfried?
A Yes, it was.
Q Will you tell us was anything said besides being presented with a document?

A No, besides that if I participated again I would be fired.
Q Who said that?
A Mr. Ehrenfried. No, I am wrong, I will say that he didn't say I would be fired, he said there was a possibility of me [83] being discharged.
Q Did he say if you participated in what, did he explain?
A No, he didn't go into detail about it.
Q And he handed you this document on that occassion, right?
A Yes, he did.
Q Now, after you received that document which is General Counsel's 8—
MR. KINTZ: I will offer General Counsel's Exhibit 8.
MR. BAHRS: No objection.
TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 8, was received in evidence.)

Q (By Mr. Kintz) After you received General Counsel's Exhibit 8, Mr. Hollins, did you distribute any more leaflets?
A Yes, I did.
Q When?
A The following Saturday.
Q Where?
A The main entrance on Market Street in front of The Emporium.
Q Was anyone else—did you distribute them anyplace besides the main entrance?
A Yes, I did, the two side entrances on Market Street too.
Q Did you observe anyone else distributing leaflets on that day?
[84] A Yes, I did, myself, Mr. Hawkins and some members who were from the Afro-American Institute.
Q They were not employees?
A No, they were not.

Q Now, on this occasion did you notice anyone having difficulty getting by where you were handing out the leaflets?
A No, I didn't.
Q On this occasion did you raise your voice at any time?
A No.
Q Did you use any vile or obscene language at any
A No.
Q Did you criticize the products or the services of The Emporium to its customers?
A No.
Q Now, after you received—after you distributed this second leaflet, which is General Counsel's 5 in evidence, the second occasion, did you have any further discussion with The Emporium concerning the activities?
A Yes, I did.
Q When was that?
A That was the following Monday.
Q All right. Where was this?
A Mr. Ehrenfried's office.
Q Who was present?
A Myself, Mr. Ehrenfried and one of his secretaries.
[85] Q What occurred on this occasion, sir?
A He served me a notice of termination.
MR. KINTZ: I have marked for identification, Your Honor, as General Counsel's 9 a document purporting to be a change of status form on the stationery of the Respondent in this proceeding, directed to this witness.

(The document above referred to, was marked General Counsel's Exhibit 9 for identification.)

Q (By Mr. Kintz) I now show you General Counsel's 9 for identification, Mr. Hollins, and ask you if you have ever seen that document before?
A Yes.
Q Is that the notice that you had reference to in your testimony a moment ago?
A Yes.
MR. KINTZ: I will offer General Counsel's 9.
MR. BAHRS: No objection.

TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 9 was received in evidence.)

MR. KINTZ: Your Honor, at this time I propose that as we did with the prior termination slip that the record include a stipulation as to the language of General Counsel's 9 as it too is somewhat illegible.

I propose a stipulation that the "Remarks" portion of [86] offered document, General Counsel's 9 read as follows: "You are being discharged today." "Distribution of 'Boycott Emporium' literature on Saturday November 9, 1968 in front of The Emporium, 835 Market Street, San Francisco, or S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68."

MR. BAHRS: So stipulated.

MR. HECHT: So stipulated.

MR. KINTZ: Thank you, Mr. Bahrs and Mr. Hecht.

TRIAL EXAMINER: The stipulation is received.

Q (By Mr. Kintz) Now, I have noted from your testimony and from the text of the leaflets you distributed what I believe could be fairly characterized as an accusation by you that The Emporium was discriminating against you because of race. What, if any basis did you have for that assertion?

A Well, myself for one.

Q When you say yourself, what do you mean?

A Well, I was told once not to come on the main selling floor because my hair, you know wasn't cut the way that they though that it should be cut.

Q Who told you this?

A I was told by my supervisor, but he told me he was authorized by Mr. Hoekenga—

Q What was that name?

A My supervisor?

[87] Q What was the name?

A John Crockett.

Q What is his position?

A He was the supervisor at the time.

Q What was the other name?

A Mr. Hoekenga.

MR. BAHRS: H-o-e-k-e-n-g-a?

THE WITNESS: Yes.

Q (By Mr. Kintz) Do you know what his position is?

A I believe it is general manager.

MR. BAHRS: That is a minority name also.

Q (By Mr. Kintz) For clarity of the record, with reference to your hair, is that what is known as a natural hair cut?

A Yes, it is.

MR. KINTZ: The record doesn't illustrate it so we have to have some idea.

Q (By Mr. Kintz) Had you had any other basis, any other personal basis or experience?

A Yes, that was one of the reasons why I was refused a supervisors job previously before the time that I was offered the temporary supervisors job was because of my hair.

TRIAL EXAMINER: That is a conclusion of the witness which has no probative weight.

MR. KINTZ: I agree.

Q (By Mr. Kintz) What were the circumstances that led you [88] to make this statement?

A It was on my rating. Mr. Holiday, who presented you with the ratings specifically stated this to me.

Q That was the conference about the rating that you described earlier in your testimony?

A Yes, it was.

TRIAL EXAMINER: What did he say to you?

THE WITNESS: He told me that there was some supervisors job open that they were considering me very highly to become a supervisor because I had all the qualifications, but I had to do something about my hair.

TRIAL EXAMINER: Is that all he said?

THE WITNESS: That's all he said.

Q (By Mr. Kintz) Other than your personal experiences, did you have anything else that you thought gave you a basis for the charge that The Emporium was discriminating?

A Yes, there were several other people, minority people in the store who we made a survey of who told us of discriminatory acts that were brought up against them.

Q You just told us two things. You said, "We" and you said "We made a survey".

A Yes. Me, myself, Mr. Hawkins and Mr. Washington.

Q Would you describe when this so-called survey took place?

MR. KINTZ: I'm sorry, Mr. Examiner, did you have something?

TRIAL EXAMINER: I was just going to say get some date.

[89] MR. KINTZ: Yes.

THE WITNESS: I can't remember any specific dates. I wouldn't want to say.

Q (By Mr. Kintz) Can you place it in relation to, let's say, the press conference? Was it before or after the press conference?

A After the press conference.

Q Do you know whether it was before or after the first time you distributed the leaflets?

A It was right after we distributed the first one, I believe.

Q All right. Now, you said you conducted a survey. Will you tell us precisely what you did and where you did it?

A We went around to all the stock areas and selling areas and stock areas to just minority people all over the entire—different areas and found out their opinion of, you know, the way minority people were being treated as far as promotions and advancements and so forth were concerned on the job.

Q Did you have a group, you say you found out their opinion.

A Yes.

Q Did you ask them questions?

A Yes.

Q Did you ask them a group of questions or did you just interview them without a group of questions?

A Some we had specific questions that we were asking and others we just asked questions at random to find out their [90] opinion.

Q Approximately how many people did you talk to in the course of this investigation?

A About 4.

Q Do you know how many people were talked to altogether?

A No, I wouldn't want to say.

Q How many people participated in the process of questioning the employees?

A I would say about 8 or 9 people or maybe more, I am not sure.

Q Did you make any record or compilation of this?

A Yes, we did.

MR. KINTZ: Your Honor, I have marked for identification as General Counsel's Exhibit 10 a document with numerous pages, the first page of which is entitled, "Briefing on Conditions", and I would like now to show the witness General Counsel's 10 for identification, asking Mr. Hollins if he has ever seen that document before.

(The document above referred to was marked General Counsel's Exhibit 10 for identification.)

Q (By Mr. Kintz) Have you ever seen that document before?

A Yes.

Q Where and under what circumstances did you first see it, sir?

A Well, under the circumstances I first saw it is when we [91] were making the survey.

Q What is this document?

A Well, it is concerning the conditions of the minority employees and what was taking place among minority employees.

Q Do you know how this document was prepared?

A Do I know how?

Q Yes, General Counsel's 10?

A Well, we took, like I said, we took the survey and then it was signed out.

Q This is the results of the survey then?
A Yes, it is.
Q All right, at least in part the results of the survey?
A Yes.
Q Do you know who actually physically prepared it and typed it up in the form it now appears in?
A No, I don't know.
Q Did you work on it in any way in putting it together as it appears here?
A Yes.

MR. KINTZ: Your Honor, I will offer General Counsel's 10.

MR. BAHRS: For what purpose now, may I ask?

MR. KINTZ: It is offered for the purpose, Your Honor, of demonstrating that the witness and previous witness, Mr. Hawkins, both had a reasonable, good faith basis and had undertaken a reasonable and good faith effort to determine the existence [92] of a problem before they engaged in the protected, concerted activity.

• • • •

[97] TRIAL EXAMINER: It has already been ruled on. It is received for the limited purpose. I don't exclude you from proving it, that these things are all facts.

MR. HECHT: I understand.

(The document above referred to, herctofore marked General Counsel's Exhibit 10 was received in evidence.)

• • • •

[104] Q (By Mr. Kintz) All right. Now, there has been some discussion before you testified, Mr. Hollins, that the matters raised by your leaflets and the entire question of racial discrimination was a question that has been discussed with the union by certain of your coworkers. Did you at any time discuss any of these matters with any representative of the union?
A Yes, I did.

• • • •

[107] Q (By Mr. Kintz) When was the first contact you had with the union concerning the matter of the

acquisition that the Emporium was discriminating based on race?
A The first actual contact I had with them was—it was about April, May, it was in May.
Q 1968?
A Yes.
Q And who was present? How did this come about?
[108] A At that time Mr. Williams was the only person present.
Q Who is Mr. Williams?
A A representative of the union.
Q Where did this take place?
A At the store, The Emporium downtown.
Q What was said?
A He asked about me personally. He didn't ask anybody else. He came to me personally and asked me about how I felt about the way that the employed minority employees were being treated and he asked me if I felt there was discrimination being carried on within the store and I told him yes, I did. He said that they were going to try to see if they could do something to straighten it out, they were holding meetings later on to that effect. They would be getting us all together to discuss it.

TRIAL EXAMINER: You have gotten an approximate date?

MR. KINTZ: Yes, I believe the witness said May.

TRIAL EXAMINER: My inadvertence.

Q (By Mr. Kintz) This was May as you recall?
A Yes.
Q Can you give us a more precise date?
A The exact date?
Q Yes.
A No.
Q After this did you have any further contact with any [109] representative of the union concerning this?
A No—yes. Mr. Williams, again, me, Mr. Hawkins and Mr. Washington, Mr. Epps and Mr. Young, we all met with Mr. Williams over at the cafeteria, right around the corner from the Emporium. We met there and we had a discussion about the problem of racial discrimination being carried on in the store and so forth.

Q When was this, Mr. Hollins?
A That was about the last part of May.
MR. BAHRS: I beg your pardon.
MR. KINTZ: About the last part of May.
Q (By Mr. Kintz) That is what you said, right?
A Yes.
Q 1968?
A Yes.
Q What was said on this occasion?
A We just discussed the matter of, you know, racial discrimination existing within the store and he told us that, you know, the union was working and seeing if they could try to talk with personnel and management, you know, to try and straighten things out, and so forth and so on. I don't remember exactly what he said about it. He said that we were supposed to have another meeting later on, you know, to try to work things out and straighten it out and so forth.
Q Did you have any other meeting later on?
[110] A The only other one that I attended after that one was the one that was in September, September 3 to be exact.
Q Where did this take place?
A It took place at the union hall.
Q Who was present there on that occasion?
A Myself, Mr. Hawkins, Mr. Young, Mr. Washington, Mr. Epps, and what is the other gentleman's name? I can't think of the other guy's name, the guy from the EOC and Mr. Johnson was there.
Q Who is Mr. Johnson?
A The President of the union.
Q All right.
A And Mr. Williams, the representative of the union was there also.
Q What happened on this occasion?
A Yes, and there was a guy from the Fair Employment Practices Committee.
Q Have you told us everyone who was there as best you can recall?
A Yes, sir, as best as I can recall.
Q Tell us what was said, what happened?

A We discussed the problem of racial discrimination and namely the topic of Russell Young, Mr. Young being passed over for a promotion that had been given to someone else, somebody else previously from outside.
[111] Q Who is Mr. Russell Young?
A He is first assistant manager at The Emporium now.
Q Was anything else discussed?
A No, that was the basic thing that we discussed, the problem of racial discrimination, Mr. Young being passed over.
Q After this did you attend any further meetings at which any representatives of the union were present?
A Yes, I did.
Q When was the next session?
A It was at the Retailers Council.
Q When?
A That was in November. Yes, it was in November. I can't think of the exact date. Mr. Williams was present from the union. He was there.
Q Yes.
A And I can't think of the guy's name over there in the dark suit.
Q There is a gentleman in the room you now identify?
A Yes.
Q Who was he representing as you understand it?
A The union.
Q Tell us what occurred on this occasion?
A They wanted to settle our grievances as far as our problem.
Q Did someone say they wanted to do this?
[112] A Yes, Mr. Williams did. That is why they had met was to see if they could work out the differences that we had, as far as our grievances, as far as racial discrimination was concerned and that they were going to see if they could straighten it out, at this Retailers Council.
Q What else was said?
A That is about all.
Q Did you stay for the whole meeting?
A No, we did not.

Q When you say, "We", did not, did you leave as a group?
A Yes.
Q Who was the group that left?
A Me, Mr. Hawkins, Mr. Epps and Mr. Washington.
Q Did you or any member of that group make any statement in this meeting?
A Yes, I did.
Q What did you say?
A I said that we didn't want to stay for the meeting that we didn't feel like the meeting was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case.
Q Did you say anything further?
A No, that's all we said.
Q Do you recall any mention about what you wanted to do about it?
[113] A No.
TRIAL EXAMINER: Would you explain to me a bit further about what you meant by taking it as a whole?
THE WITNESS: Yes, when we first came in, Mr. Williams, the representative from the union, he began to take each person's grievances individually and as soon as he started doing that is when I started to make the statement I made.
TRIAL EXAMINER: I know. I don't think I quite understand what your position was when you said taking them, "As a whole". What did you mean the four of you or all of the minority groups?
THE WITNESS: All of the minority groups.
TRIAL EXAMINER: You wanted to treat it as a grievance affecting all minority groups, is that right?
THE WITNESS: Yes.
TRIAL EXAMINER: I want to get your position clear.
THE WITNESS: That's right.
Q (By Mr. Kintz) As I understand—
TRIAL EXAMINER: I take it your contention being that all of the minority groups were being discriminated against, is that right, was that your position?

THE WITNESS: Yes.
Q (By Mr. Kintz) Just to carry it one step further, it was my understanding that what you were trying to do and you didn't want a solution of the problems of individuals, you wanted some basic change that would benefit the treatment of all [114] minority people, is that right?
A That's correct.
Q All right. Did you attend any other meetings where any other representatives of the union were present?
A No, that was the last that I can recall.
Q Now, I show you General Counsel's 7 and ask you if you have ever seen that document before, Mr. Hollins?
A Yes, I have.
Q Where and under what circumstances did you first see that?
A This was issued out by Mr. Williams to some employees at the store.
Q I'm sorry?
A It was issued out by Mr. Williams, the representative of the union to some of the employees of the store and I am not sure about this, but I believe it was posted too.
Q At the store?
A At the store, yes.
TRIAL EXAMINER: I don't know. This is dated, I notice this is dated April 11, is that correct, sir?
MR. KINTZ: Yes, that is my understanding of the correct date, but I have no personal knowledge.
TRIAL EXAMINER: It is so long before the events here that I just wondered.
MR. KINTZ: If you recall the testimony of the witness, his initial conversation with the union goes back to this [115] period, both witnesses.
TRIAL EXAMINER: You put this into show the historical background I take it?
MR. KINTZ: I put it in for another reason that satisfies the basis of Tanner that someone else believed it.
TRIAL EXAMINER: Yes, I know. Proceed.
Q (By Mr. Kintz) Do you recall about when that was that you first saw General Counsel's 7?

A It was about four days after the meeting had taken place.

Q That was the meeting back in April?

A Yes.

Q Somewhere around the date that appears on the document, is that which is April 11?

A Yes, April 11.

MR. KINTZ: No further questions, Your Honor.

TRIAL EXAMINER: Okay. Mr. Hecht, do you have some questions?

MR. HECHT: I would like to have just a minute with Mr. Kintz.

TRIAL EXAMINER: Yes, you may.

MR. HECHT: I have no further questions, Your Honor.

TRIAL EXAMINER: I think we might take a 15 minute recess.

(Short recess)

TRIAL EXAMINER: On the record. Cross-examination, Mr. Bahrs?

[116] MR. BAHRS: Yes.

CROSS-EXAMINATION

Q (By Mr. Bahrs) Mr. Hollins, I believe that you testified that a representative of management of The Emporium told you that you were suited to act as a superintendent?

MR. KINTZ: Supervisor.

Q (By Mr. Bahrs) Supervisor?

A Yes.

Q And that you were made a temporary supervisor?

A Yes, I was.

Q You say you couldn't recall a date. Was it before the date that you had this press conference?

A Yes, it was.

Q And it was before the date that you distributed the leaflets, is that right?

A Yes, it was.

Q Could you tell us how—thereafter I believe you were informed that you were eligible for a position—for a permanent position as a supervisor, is that correct?

A Yes.

Q I ask you to tell us how long before the press conference this conversation took place?

A Not definitely. I can't tell you definitely. I know I can say approximately, however.

TRIAL EXAMINER: Was it a matter of weeks, days, months?

[117] THE WITNESS: It was about three weeks.

Q (By Mr. Bahrs) About three weeks?

A Yes.

Q As I understood your testimony, and you correct me if I am mistaken, you were offered this position as a supervisor on a permanent basis and you refused it, is that correct?

A Yes, I did.

Q Did you continue to act as a supervisor on a temporary basis?

A After that?

Q Yes.

A Yes, I did.

Q Did you continue to act as a supervisor—were you acting and paid as a supervisor at the time of the press conference?

A Yes, I was.

Q And also at the time that you distributed the leaflets?

A Yes.

Q And at the time that you were discharged, is that correct?

A Yes.

Q Now, I believe in your direct testimony you stated that you and the other three members of this group of four employees believe that the minority employees were not being fairly treated at The Emporium?

A Yes.

[118] Q Is that right?

A Yes.

Q And that is what you publicized at the press conference and by the leaflets, is that correct?
A Yes.
Q Did you ever present such a grievance to any representative of The Emporium?
A Wait a minute. I don't understand what you are saying.
Q Well, how far—do you remember that you had a conference that The Emporium wasn't treating the minority employees properly?
A Yes.
Q Did you ever tell Mr. Ehrenfried or Mr. Henderson or anybody with The Emporium that this was going on?
A Yes, I did.
Q Who did you tell that to?
A Mr. Henderson, I talked with him once.
Q I beg your pardon?
A Mr. Henderson, I talked with him once.
Q When was this?
A I can't remember the exact date.
Q Was it before or after you had the press conference?
A Long before I had the press conference.
Q Do you recall refusing to talk to Mr. Henderson on one occasion?
[119] A Yes, I did.
Q Would you tell us when that was?
A I went up to see Mr. Batchelder.
Q B-a-t-c-h-e-l-d-e-r?
A Yes.
Q Who was the President?
A Yes.
Q You went to see Mr. Batchelder, the President?
A Yes, I did.
Q Was this after the 16th of October between the 16th and the 18th?
A I can't say for sure.
Q Do you remember whether it was before or after you appeared at the Adjustment Board?
A I can't say for sure.

Q Was it before that time?
A Yes.
Q Somewhere around there?
A Yes.
Q You tell us please what you did and what happened.
A I just went up and I told him, Mr. Batchelder, that is, I said, "I want to talk about a situation that I felt should be discussed about things that were happening among minority employees at the store." He said that he didn't want to talk. He told me that Mr. Henderson took care of problems like that.
[120] Q Do you know Mr. Henderson's position there?
A Yes.
Q What was it?
A I believe the personnel director.
Q Personnel director?
A Right.
Q And is it correct that Mr. Batchelder invited you to discuss these problems with Mr. Henderson?
A Yes, he did.
Q And that you refused to do so, is that correct?
A Yes, I did.
Q Now, you attended a meeeting with the union at which a number of employees were present and a number of union officials. I believe you stated sometime in May 1968, is that right?
A Yes.
Q And at that time did you and the other employees relate to the union officials that you believed that there were acts of discrimination by The Emporium against minority employees, black, yellow, brown, red and so forth?
A Right.
Q Right. And did the union officials at that time say that they would attempt to discuss these with The Emporium and to correct them?
A Yes.
Q They did, they told you that?
[121] A Yes.
Q Did you have another meeting later in September?

A Yes.
Q At which you discussed the same matter?
A Yes.
Q And did—were the—did the employees present at that meeting again inform the union officials of acts that they considered were discrimination by The Emporium?
A Yes.
Q Did the union officials tell you that they were going to correct these through the processes under the union contract?
A Yes.
Q They did, right?
A Yes.
Q What did you say at that time?
A At this meeting on September 3?
Q Right.
A I didn't say anything personally.
Q Then you had a meeting in the cafeteria with the four union officials, is that right?
A Wait a minute, that wasn't after then, that was before then.
Q After what was that?
A The September 3 meeting, we didn't have a meeting in the cafeteria with them.
[122] Q Do you remember ever having a meeting in a cafeteria with two or three union officials?
A Yes, uh huh.
Q Do you remember when that took place?
A Yes, I believe it was sometime in May.
Q Oh, I see. I was going to say it was early in May, is that right?
A Yes.
Q This was one of the first meetings that you had, is that right?
A Yes, it was.
Q Now, do you recall that—did the union ever tell you that they had a group of eight employees that they were going to present a grievance for, the union was going to appear on behalf of eight employees who had grievances against The Emporium?
A I don't recall that, no.

Q Well, do you know that there were four employees who appeared at an Adjustment Board hearing on October 16?
A Four employees?
Q Four employees.
A Employees?
Q Yes, four minority—
A Yes.
Q And they testified, is that right?
[123] A I don't know, I wasn't there.
Q All right, but you know that they appeared, right?
A Yes.
Q And you and Mr. Hawkins and Mr. Epps and one other person, did you tell the union that you were not appearing except as a group of four?
A Yes.
Q You did, right?
A Yes.
Q And was a meeting of the Adjustment Board scheduled for October 18th?
A Yes.
Q And did you attend that meeting?
A There was one that we didn't attend.
Q All right. Now, that was on the 16th. This is two days—
A Yes, we attended that one.
Q The other four people attended on the 16th. You four, you, Mr. Hawkins, Mr. Epps and who was the fourth one?
A Mr. Washington.
Q All right, and Mr. Washington, right?
A Yes.
Q And the four of you were there and the union undertook to proceed on this Adjustment Board hearing and did you make a statement at that time?
A Yes, I did.
[124] Q Would you tell us please what you said?
A I said that we didn't want to have our case taken as an individual thing as I stated before, we all wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store.

Q By that did you mean that you objected to the four of you presenting your case at the same time?
A The four of us presenting our case at the same time?
Q Yes.
A No.
Q Well, didn't you—do you remember what statement you made at the meeting?
A The one I just mentioned.
Q Yes. Did you say at that time that you were going to take—the four of you were going to take this up with the President of the Emporium?
A The President?
Q Yes.
A No, we said we would like to have a meeting with the President, yes, but—
Q Well, didn't you say that you wouldn't continue further with the union before the Adjustment Board?
A That we wouldn't—
Q That's right.
A No, we never did make that statement.
[125] Q Well, didn't the four of you walk out?
A Yes.
Q All right. And didn't you say that you wouldn't go ahead with the Adjustment Board hearing?
A Yes.
MR. BAHRS: I think that is all.
Q (By Trial Examiner) You testified, I believe that at the time you were discharged you were temporary supervisor being paid supervisory wages, is that correct?
A That's correct.
Q I think the prior witness testified something about supervisor badges. Are supervisors normally supplied with badges stating that they were supervisors?
A Yes.
Q Had you been supplied with one?
A No, I hadn't.
Q Had you been protesting saying that you had not been supplied with one?
A Yes, and I had a lot of trouble getting my status changed. I had a lot of trouble getting my badge and plus my status changed.

Q Did you ever get your badge?
A No.
Q Do The Emporium supervisors wear badges or do you know?
A No, I couldn't say.
[126] Q As I understood your testimony, you refused to have them make you a permanent supervisor?
A Yes.
Q You were willing to be a temporary supervisor?
A Yes.
Q You took the place of somebody who was sick?
A Yes.
Q At the time you were discharged was he still sick?
A No, he wasn't.
Q Had anybody been named permanent supervisor to take his place?
A No, he came back.
Q He did finally come back?
A Yes.
Q Was that before you were discharged?
A Yes.
Q Did you continue to act as a temporary supervisor after he came back?
A Well, not in the same department, yes, I did.
Q He didn't come back to his same old job then?
A Yes, he came back to his same job he had but I was transferred.
Q Was that after he came back that you were transferred?
A Yes.
Q But when you were transferred you were still acting as a temporary supervisor drawing supervisor wages, is that correct?
[127] A Yes, uh huh.
TRIAL EXAMINER: Any questions?
MR. KINTZ: Yes.

REDIRECT EXAMINATION

Q (By Mr. Kintz) Mr. Hollins—
TRIAL EXAMINER: By the way, you used the word temporary. Had you been told when that status was to be concluded, that is before you were discharged?

THE WITNESS: Yes.
TRIAL EXAMINER: What did they say about it?
THE WITNESS: Mr. Graff told me—I was working similar to the tire department and he told me it would be just until after Christmas.
TRIAL EXAMINER: Who told you that?
THE WITNESS: Mr. Graff.
TRIAL EXAMINER: Proceed, Mr. Kintz.
MR. KINTZ: No further questions.
MR. BAHRS: Well, I call—
TRIAL EXAMINER: You are excused.

(Witness excused)

MR. BAHRS: I call Mr. Johnson.
TRIAL EXAMINER: Is the other counsel resting?
MR. KINTZ: Yes, Your Honor.
TRIAL EXAMINER: Does the Charging Party rest?
MR. HECHT: We rest.
[128] TRIAL EXAMINER: All right. Now, we are now on Respondent's case in chief.
MR. BAHRS: I call Mr. Johnson.
TRIAL EXAMINER: Come forward, sir, and raise your right hand and be sworn.
Whereupon,

WALTER L. JOHNSON

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows,

DIRECT EXAMINATION

Q (By Mr. Bahrs) Mr. Johnson, for the record would you give us your name and address and what is your occupation?

A Walter L. Johnson, 334 Holly Avenue, South San Francisco, employed by the Department Store Employees Union, Scretary-Treasurer.

Q And were you Secretary-Treasurer at all times in 1968?

A Yes.

Q Would you—I will show you Joint Exhibit No. 2 which purports to be a copy of the collective bargaining agreement with the San Francisco Retailers Council and ask you if that is a true copy of the agreement that was in effect between the Department Store Employees Union Local 1100 and San Francisco Retailers Council on behalf of a group of stores including The Emporium as shown on page 25 of the document?
[129] A Yes.
Q Was this contract in effect at all times from and after December 29, 1967 up to date?
A Yes.
Q Is there a provision in there would you point out that to us?
TRIAL EXAMINER: Counselor we have this in evidence you know.
MR. BAHRS: Yes.
TRIAL EXAMINER: All you have to do is refer to it.
MR. BAHRS: Yes, that's correct.
Q (By Mr. Bahrs) Is there a provision in there—
TRIAL EXAMINER: You can point it out to him.
MR. KINTZ: I will stipulate.
Q (By Mr. Bahrs) With respect to the subject of racial discrimination.
A I think it is listed under general working conditions.
Q Would you look at it please?
TRIAL EXAMINER: Cite it. It is in evidence.
MR. BAHRS: All right.
THE WITNESS: Page 10.
Q (By Mr. Bahrs) Page 10, right?
A 21E.
MR. BAHRS: "No person shall be discriminated against in regard to hire, tenure of employment or job status by reason [130] of race, color, creed, national origin, age or sex."
Q (By Mr. Bahrs) That has remained in effect throughout the life of the agreement of General Counsel's Exhibit 2, is that right?
A Yes.

Q Now, you are familiar with these two gentlemen, Mr. Hawkins and Mr. Hollins, is that correct?

A I know them, yes.

Q Do you know what classification of work they perform in The Emporium?

A Reserve stock.

Q Is that one of the classifications that is included in the collective bargaining agreement, Joint Exhibit No. 2? Is that right?

A Yes.

Q Did you have any meetings with Mr. Hollins and Mr. Hawkins and others in which they related to you grievances concerning discrimination on the part of The Emporium?

A Yes.

Q Would you tell us please the first of those meetings, when and where, and who was there and—

MR. HECHT: I will renew my objection that I made earlier to this line of questioning.

TRIAL EXAMINER: You may have a continuing objection, Mr. Hecht.

[131] THE WITNESS: If it be okay I can summarize most of it I think.

Q (By Mr. Bahrs) That's all right.

MR. KINTZ: No objection.

THE WITNESS: Okay. I think in order to get the proper context we have to go back into 1967 where we had signed the union shop agreement with the department stores.

Prior to this time it was an open shop situation and in the nonselling areas we had some people. We were better organized in the selling areas and we had picked up several members prior to the union shop going into effect and after in the non-selling areas, some had been there a long time and had finally joined the union and had become participating members.

One man in the stock department had signed up about 15 of them and he asked if we would arrange a meeting to discuss certain grievances that existed in the stock area.

At the first meeting, I think it was in April, April 3, I believe—

TRIAL EXAMINER: 1967, '68?

THE WITNESS: '68. At this meeting the group presented a paper with 10 or 11 grievances on it that they wanted to have looked into. Among the—

Q (By Mr. Bahrs) Excuse me, sir. Were all the members of the group employees of The Emporium?

[132] A Yes.

Q In the classifications covered by the agreement, is that right?

A They were either working in stock or marking areas.

Q I see. Thank you.

A At this meeting they had the group of grievances. We took two or three and then I think number 10 was the one dealing with race discrimination and it was the general consensus of the opinion that of those present that there were less opportunities for those who were in the minority race, not only Negroes, but we had Filipinos and all different groups represented.

Among the grievances mentioned were the facts that they had probably not proper treatment from the supervisors and also not the opportunity for promotion.

We met for sometime that evening and that at that time we selected a committee to go into it further.

From the minutes of the meeting I drew up a document that has been—this is not the original document that was submitted here. The first one was gone over, given to the committee and they suggested certain changes in it emphasizing the fact that Russell Young was not promoted.

Taking into consideration the changes that they suggested I drew up the document and we had a meeting with the Retailers Council.

Q Excuse me, sir. Would you please look at General Counsel's [133] 7?

A Yes.

Q Is that a copy of the document that you were referring to?

A That is the revised document, the corrections were suggested by the people involved.

Q Fine.

A We had a meeting of the Retailers Council to discuss it and at that meeting it was determined that we would have a meeting at the Emporium. We met at The Emporium with the committee, Mr. Ehrenfried, Mr. Brown for the Council, Miss Anibale for the Emporium.

Q Give us the date.

A It was sometime after April 11, after the report was submitted to the Retailers Council, I would say within two weeks. After that meeting it was brought out and the committee was quite outspoken as to what their feelings were on it. Mr. Young specifically referred to the fact that he had not been promoted.

TRIAL EXAMINER: Mr. Young belonged to a minority race, did he?

THE WITNESS: Yes, he is a Negro, and other people brought out the grievances. It was agreed at that time that the store would look into it and then see what they could do to alleviate the circumstances.

In May we received a call from one of the members in the [134] store and they said they wanted a meeting, about 10 people, down at Gianinis, close to The Emporium and I went down there alone to meet with them. At this point we were concerned with Russell Young and we brough some of these things up to the employer and Mr. Williams had been in contact with some of the individuals involved and he had asked that we have a meeting with the group.

They specified—I talked to Mr. Young and Mr. Washington myself and I said I wanted a meeting with them and they said that Russell was going on vacation and they wanted it to be held when he came back. There was some delay in there and finally in September we had a meeting and at the union hall where we had the Court Reporter and Mr. Scott and I think he is with some government agency and Mr. Smith, I believe it was, from the FEPC.

At this meeting there were quite a few things discussed and we specifically informed the individuals that we

were going to go into an Adjustment Board, that we wanted to process these grievances and we felt that there were problems of discrimination and it was my own personal feeling that all the discriminatory acts should be processed and that we ought to follow through and take care of it.

At this meeting I specifically requested and pointed out that it is going to take a long time in some of these cases, but that they would not only be helping themselves, but other [135] people involved in it, because we had very strong feelings on the question.

It was agreed at that time and they were advised by both Mr. Scott and Mr. Smith to take it to the union and that the union should follow through and take whatever steps are necessary up to and including arbitration to adjudicate the grievances.

The Adjustment Board was finally scheduled for October 16, I believe it was and at this time unfortunately I was out of town, in Omaha, Nebraska at a National Church conference and since this had been well in advance, there was no way for me to not attend it and Mr. Griffin and Mr. Williams and Mrs. Reed represented the union at the Adjustment Board.

At this time the case was presented and they had a meeting and wanted to have the testimony and I previosuly had talked to our attorney to prepare a position for the union which was drawn up and have ready for the Adjustment Board.

We also discussed with Mr. Brown this subject after the first meeting had been held because it was my feeling certain acts had to take place in order that everybody at The Emporium would have an opportunity not only to have a job, but to advance into new positions.

Unfortunately because of lack of testimony I called from Omaha to see how things were going along and was informed that while four did testify, four would not testify unless they [136] could testify as a group rather than as individual witnesses. This is the way it was explained to me anyhow.

I wasn't very happy because we had involved everybody including our attorney and we had prepared to go on into arbitration.

Several times I informed all of the people that in my opinion the only solution to the problem was to follow the agreement in order that we could then have some lasting effect on any situation of discrimination.

I feel very badly that we were not able to process it after the testimony was not presented by the affected individuals, and this is very vital testimony, our attorney advised that it would be very difficult to proceed to arbitration because we would not have a whole case to present.

Subsequently, we had a situation where the gentlemen plural were terminated for supposedly boycotting The Emporium and there are time limits in the contract. In order that the time limits would be protected I sent a letter to the Retailers Council protesting the discharge and said that we wanted to take care of our responsibilities as to all the individuals.

I did not feel that it was our rsponsibility to go out and seek out the people who had rights under the contract even though Mr. Hollins never became a union member, we represented him the same as everyone else. [137] I believe that summarizes the position at least for an opening.

Q At any time after the second scheduled Adjustment Board meeting, did you have any conversation with Mr. Hollins or Mr. Hawkins when they were putting these leaflets?

A I talked to Mr. Hollins one Saturday.

Q Would you tell us please when that was and where it was and what took place?

A It was sort of a one way conversation. I informed Mr. Hollins that I thought the only way to resolve the matter was through an arbitration. I didn't want to see them get fired. He informed me that the only one they wanted to talk to was Mr. Batchelder and I informed him that we had concluded negotiations in 1967 and I was a spokesman for the union and represented a few thousand clerks and I have never met Mr. Batchelder and these are responsibilities that are assigned to other

individuals. That was the extent of the conversation. That is the only time I spoke to anybody since then.

Q Was anybody with you at the time?

A Well, Mr. Griffin, I don't think he was in the immediate—he was near me though.

Q He didn't overhear you?

A He might have talked to Mr. Hollins on his own though.

MR. BAHRS: That's all I have.

CROSS-EXAMINATION

[138] Q (By Mr. Kintz) Mr. Johnson, as I understand it the secretary-treasurer is the chief executive officer of your organization, is that right?

A Yes.

Q So you are the highest authority in the local, is that right?

A I am the one that gets the blame, yes.

Q The buck stops with you, is that the phrase?

A Quite a few things.

Q In the course of your testimony I heard you use the phrase that you felt that there were problems of discrimination, is that a correct statement of your feelings?

A Yes.

Q Did it have reference to The Emporium?

A Oh, yes.

Q What was the basis of this? Why did you feel this way?

A I came to the conclusion after the meeting we had in April that there was a serious situation that developed and it had to be taken care of.

Q How many employees of The Emporium did you discuss the matter with, Mr. Johnson?

A Well, at the meeting I would say—we have a list of meeting attendants cards, but I would say about 40 or so that night.

Q Was it from these discussions that you reached the [139] conclusion that there was a problem in discrimination?

A That was the first time.

Q Did you undertake any other investigation about the problem of discrimination at The Emporium?

A I talked to the gentlemen and other minority people.

Q Approximately how many others on other occasions did you speak with?

A Off and on I spoke to Russell Young and then we had the meeting of the 10th. In Gianini's I asked another lady I happened to know there whether she thought there was discrimination in some type, subtle or otherwise and she said, "Yes".

Q So from talking to people one occasion or another, you formed this impression as a personal impression of yours? It also eventually became the official position of your union, is that right, sir?

A Definitely.

Q As a matter of fact it was not only the official position of the union that there was racial discrimination at The Emporium, but that was the official position that you communicated to Mr. Hollins and Mr. Hawkins, is that right?

A Oh, sure.

Q You communicated with lots of minority people there?

A I communicated with anybody that would listen to it.

Q Isn't it a fact that you, Mr. Johnson, as the collective [140] bargaining representative of the employees, felt that you had certain obligations to do something about it?

A I felt all of the members of the union had an obligation.

Q And you as a chief executive officer had a particular obligation?

A Oh, yes, the most important responsibility rested with me, but I should also point out that the thing is that I explained it to the members involved in this instance not once but many times that we could only carry forth and do our job if we had their cooperation. We were the doctor and we had to have their cooperation.

Q I show you now General Counsel's Exhibit 7. That document was prepared by you, was it, sir?

A After it was prepared and then submitted to the individuals involved and after corrections were suggested I finalized it and presented it to the Retailers Council.

Q It bears your signature on the original. I will show you General Counsel's Exhibit 7. Is that your signature, sir?

A Oh, yes.

Q So the contents of this report at this point then became the official position of your union with you as spokesman, is that right?

A Oh, yes.

Q Now, —

A I don't think there was ever any doubt about that.

[141] Q Right. Did you cause that document or did you know whether that document was caused to be posted on the bulletin board of The Emporium by any officials of the union?

A I didn't direct them to. We gave copies out to several members and I presented it to the Retailers Council and to Mr. Ehrenfried, but I did not direct it to be posted, no. We had enough copies around and I imagine again like some other things, people would post things on the boards.

Q Isn't it also correct, Mr. Johnson, in your position as chief representative of the collective bargaining agreement, as the collective bargaining agent of the union, that you specifically charged The Emporium with discriminating against minority persons?

A Yes, I requested the Adjustment Board.

MR. KINTZ: May we have a minute off the record?

TRIAL EXAMINER: Yes, off the record.

(Discussion off the record)

TRIAL EXAMINER: Back on the record.

MR. KINTZ: Your Honor, I have marked for identification as General Counsel's Exhibit 11, a document purporting to be a letter from—or to Mr. Vincent Brown of the San Francisco Retailers Council from Walter L. Johnson.

(The document above referred to was marked General Counsel's Exhibit 11 for identification.)

Q (By Mr. Kintz) I do not have the original of that [142] document and I show you what purports to be a copy and ask you if you ever recall seeing it before, Mr. Johnson?

A That's right, it is ours.

Q Did you cause the original of this letter to be sent to Mr. Vincent Brown?

A Yes.

Q Will you tell us who Mr. Vincent Brown is please?

A Well, Mr. Brown was a former general manager of the San Francisco Retailers Council. He is no longer employed there anymore and the San Francisco Retailers Council consists of the group of stores involved in the contract that Mr. Bahrs referred to.

Q That is a multi-employer group that bargains with your union to get to the heart of the matter, is it not?

A Yes. Any Adjustment Board letters or anything setting up Adjustment Boards was handled through the Retailers Council and Mr. Brown.

Q And the letter which I have just shown you bearing a date September 4, 1968, was it sent on or about that date, sir?

A Yes.

Q Am I correct that this letter, since I am not so sure that it speaks for itself, Your Honor, had reference to the questions of racial discrimination at The Emporium?

A Yes. It was sent immedaitely after our meeting in September the next day.

[143] Q And that is what it has reference to?

A Right, we did not have the transcript at that time so we guessed at the number of pages.

Q And I now have your copy of the transcript as a matter of fact, is that right, Mr. Johnson?

A We never got it back from somebody. We would like to have it back.

Q I promised you when you left today you could have it back.

MR. KINTZ: I offer General Counsel's 11 into evidence. I request leave to make copies.

MR. BAHRS: No objection.

TRIAL EXAMINER: Received.

(The document above referred to, heretofore marked General Counsel's Exhibit 11, was received in evidence.)

TRIAL EXAMINER: It may be withdrawn for purposes of making copies.

MR. KINTZ: Yes, thank you.

Q (By Mr. Kintz) Now, at any time during the course of what you outlined in your testimony as to the discussions about this problem that you had with the employees concerned and with the management representatives, at any time did you warn or instruct the employees not to engage in any activity on their own?

A No, I think at the September meeting there were some frustrations exhibited about the situation.

[144] Q I see.

A And it was suggested that we picket The Emporium.

Q It was suggested that who picket The Emporium?

A The union and the union members and we informed them that we had a contract, we couldn't participate in any boycotting activities, that individuals could take whatever action they wanted to as long as it was legal.

Q When you say that these things were pointed out did you specifically tell the employees who were present that they could take whatever action they wanted to?

A Yes. I said that an individual has the right to take action, but a union could not.

Q You explained to them, I assume, that the reason the union could not was that it had a contract and it would be breaching the contract if it picketed, is that right?

A The subject came up because of the fact, as I pointed out, that there were frustrations, even though at the beginning I pointed out to all of the people and I wasn't going to make any rash promises, that this was taking time, even if it went to arbitration it could take seven months to get a decision. At particular times throughout the summer they wanted something dramatic. I informed them what an individual wanted to do on

their own, they could do, but I wasn't going to engage in any drama, but I wanted some orderly legal procedures that would have some long lasting effect.

[145] Q As a matter of fact the people you were talking to included Mr. Hawkins and Mr. Hollins, isn't that right?

A Yes.

Q They were present?

A Yes.

Q As a matter of fact this was an exchange between you and Mr. Hollins?

A Well, there were a group of people present. They were present and I probably was addressing myself to Mr. Hawkins at the particular time.

Q One more thing about that meeting. You mentioned some testimony—I should say you mentioned in your testimony that some statements were made by Mr. Smith. Mr. Smith is an official of the Fair Employment Practices Commission, is that right?

A Yes.

Q Do you recall Mr. Smith in the course of that meeting in the presence of Mr. Hawkins and Mr. Hollins stating that he joined with Mr. Scott in saying that these young fellows really have legitimate beefs or words to that effect?

A Oh, yes. He said that it was beyond the picketing stage, I believe, Mr. Scott said that, but Mr. Smith said that he complimented the young people in coming before that Board that evening and in doing so he felt that they ought to following the union's advice and stick with the union and let the union [146] handle it, and I believe he pointed out that the arbitration had to take place before any court procedures, or proceedings.

Q Did he also invite them to make use of the facilities of the Fair Employment Practices Commission?

A Yes, he said, "I am not soliciting anything, however, I want to point out that we are available if anybody needs us."

Q I am not sure the record is clear in this regard, but who is Mr. Scott and what is his position?

A Mr. Scott was a former organizer of the Seafarers Union and I am trying to think of the organization that—

Q Is it the Equal Employment Opportunities Commission?

A That's right, the 6th Street office.

Q Economic Opportunity Commission?

A Yes, that's right. There are so many I can't keep up with them these days.

MR. KINTZ: I have no further questions, Mr. Johnson.

MR. HECHT: No questions.

REDIRECT EXAMINATION

Q (By Mr. Bahrs) I would like to get clear about this conversation that took place at this September meeting. The representative of the Fair Employment Practices Commission stated that he thought the employees ought to follow the union's advice and use the union's procedure, is that right?

A I believe that was it.

Q And by that did you understand that to mean the Adjustment [147] Board procedure and arbitration?

A No, I think he referred more to arbitration than he did Adjustment Board.

Q All right, arbitration.

A Yes.

Q Do I understand that you at any time advised the employees that they should picket The Emporium?

A No, I didn't.

Q Did you advise the employees that they should follow the union procedure set forth in the contract?

A I said that if they wanted some longlasting effect that they should follow the union's procedure and I wasn't going to engage in any drama, however, if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals.

Q Then the union would have no responsibility for that?

A No responsibility as long as it isn't concerned with the contract. We will advise them as to what we thought

was the best procedure, but it was obvious that our advice didn't carry much weight at the time.

Q Well, your advice was that they follow the Adjustment Board and arbitration procedures, is that correct?

A All the way through, yes.

MR. BAHRS: That's all.

MR. HECHT: Nothing further.

[148] MR. KINTZ: Nothing further.

TRIAL EXAMINER: You are excused.

(Witness excused)

MR. BAHRS: I call Mr. Griffin.

TRIAL EXAMINER: Come forward and raise your right hand and be sworn.

Whereupon,

W. GRIFFIN

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bahrs) Tell us please your position.

A Business Agent and assistant to the President of the Department Store Employees Union of San Francisco.

Q Were you such at all times in 1968?

A I was Business Agent.

Q Now, did you attend any of these meetings that had been described here between the employees of The Emporium, members of minority groups that had conferred with officials of the union?

A Yes.

Q Tell us please the first of those, when and where?

A The first meeting was not at Giannini's, but at the Manning restaurant with Mr. Williams on Market Street. I [149] was asked to go down with him because we wanted to meet with these young men who had problems in that department, we wanted to get to the facts.

Q As best you can, tell us when was this?

A It had to be in April or May. I don't remember the exact date.

Q Who was there?

A Mr. Hawkins was there, Mr. Hollins was there, Mr. Epps was there, Mr. Washington, it was about eight or nine in all.

Q And will you tell us, please, what was said?

A Well, the men, which we agreed after hearing their story, that there was something that merited further investigation by the union, that we felt that there were problems in this department, as Mr. Johnson stated earlier after our contract in 1967, it was the first time that we ever had a chance to get in the nonselling areas in all the retail downtown department stores, and not being knowledgeable of the situation in these departments, we felt that we should really dig right into it and get the facts after these young men so eloquently relayed their stories to us about the fact that they weren't being able to get upgraded in their positions and they would be trainees for six months and not get up-graded and, the guy, for example, who was a supervisor, he would still be pushing a broom, and this set up a series of meetings. I did not attend the meeting with Mr. Johnson.

[150] Q Did you inform the employees at this first meeting that the union would investigate this further?

A And take whatever action is necessary.

Q Did you attend this meeting in September?

A Yes, I attended that meeting.

Q That was testified to by Mr. Johnson?

A Yes.

Q And generally could you tell us how many employees spoke with reference to what they considered were acts of discrimination by The Emporium?

A Oh, just judging from recollection now, there wasn't a single one there that couldn't relate to some sort of discrimination. We had our shop steward Miss Vera Duhon, who works in the basement. We also had Miss Lubguban, L-u-b-g-u-b-a-n, and the two men present and others. They all testified to some sort of discrimination going on in The Emporium.

Q Now, was there some statement made by—or on behalf of the union either by Mr. Johnson or yourself as to what action the union would take?

A Mr. Johnson conducted the meeting that night and he properly stated it for the record.

Q You heard his testimony?

A Yes.

TRIAL EXAMINER: You heard his testimony and you adopt it as yours?

[151] THE WITNESS: Yes, I adopt it.

Q (By Mr. Bahrs) As correct?

A Yes.

Q Did you hear Mr. Johnson tell the employees that they should take any individual action of picketing?

A He did not tell them to picket. He said it was up to them as individuals to take whatever actions they wished, but he hoped that it would follow the program as laid down by the union in adjudicating these grievances.

Q Through the arbitration?

A Yes, and the Adjustment Board.

Q Following that meeting, did you have occasion to see Messrs. Hawkins and Hollins picketing in front of The Emporium?

A Yes.

Q Would you tell us please when that was?

A I would not be truthful if I could not give the exact date. Was it on November on a Saturday?

TRIAL EXAMINER: The dates are not in dispute.

Q (By Mr. Bahrs) November 2, is that right?

A Yes.

Q November 2 and November 9?

A I couldn't testify as to the exact dates.

Q Did you have a conversation with either Mr. Hawkins and Mr. Hollins?

[152] A I think I talked to Mr. Hawkins later.

Q Tell us, please, what the conversation was.

A Gee, I don't recollect. It was along the lines of letting the union handle it. I thought they were going the wrong way about it, if I remember correctly.

MR. BAHRS: I think that is all.

TRIAL EXAMINER: Cross-Examination?

MR. KINTZ: Yes.

CROSS-EXAMINATION

Q (By Mr. Kintz) Mr. Griffin, you stated that you had heard testimony of Mr. Johnson and that you were adopting it here. Do I assume correctly—with respect to that meeting at least—

A Yes.

Q Do I assume correctly that you were also adopting Mr. Johnson's testimony with respect to the questions that I asked him?

A Yes.

Q Now, as I understand it, the incident on November —that is in which you observed the employees picketing, all you can recall is making some statements to them to the effect that you thought they ought to let the union handle it, is that correct, nothing more than that?

A Yes, nothing more than that. I have had very cordial relations with them.

[153] Q I see. Have you at any time expressed—strike that.

I understand that you participated in a group of meetings with employees of The Emporium concerning the issue of racial discrimination, is that right?

A Well, the meetings so stated. I just happen to be sitting in the meetings.

Q Offhand would you estimate how many employees of The Emporium you discussed the issue of racial discrimination with?

A I couldn't offhand tell you. It would be an educated guess.

Q In any event, I understood you talked to some?

A Yes.

Q Did you form any opinion or conclusion in your mind as to the merit of this claim?

A I think their claim valid.

Q Did you at any time express that opinion to Mr. Hawkins and Mr. Hollins or both?

A I don't remember whether I did or not. I don't say that I did, I don't remember.

Q You don't remember whether or not you did?

A Yes.

MR. KINTZ: No further questions.

MR. HECHT: No further questions.

TRIAL EXAMINER: You are excused, sir.

(Witness excused)

[154] MR. BAHRS: May we have just a moment?

TRIAL EXAMINER: Certainly. Let's have a five minute recess.

(Short recess)

TRIAL EXAMINER: Back on the record. You may proceed, Mr. Bahrs.

MR. BAHRS: I will call Mr. Carver.

TRIAL EXAMINER: Come forward, sir, and raise your right hand and be sworn.

Whereupon,

HOWARD CARVER

was called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat.

DIRECT EXAMINATION

Q (By Mr. Bahrs) Will you please state your—what is your position and occupation, Mr. Carver?

A I am assistant president of The Emporium-Capwell Company.

Q For how long have you held that position?

A Eleven years.

TRIAL EXAMINER: I don't believe you got his name. State your full name for the record.

THE WITNESS: Howard Carver.

Q (By Mr. Bahrs) Your address?

[155] A 55 Poincetta, P-o-i-n-c-e-t-t-a, Daly City.

Q Mr. Carver, there has been received in evidence as Joint Exhibit 1(a) and 1(b) a report, an employers information report, Equal Employment Opportunities report, so to speak. Did you have anything to do with the preparation of this report?

A I supervised the compilation in all units, yes.

Q So to enable the Trial Examiner to understand the significance of some of these figures in here, would you please point out the number of Negroes or other minorities that have been promoted to the highest positions or high positions in The Emporium?

A This report of the EEOC—

TRIAL EXAMINER: Could we get a date on the report?

THE WITNESS: April 24, 1968.

Q (By Mr. Bahrs) Right.

A This reports breaks down into all employees, a total, and then male and female, comprising that total, and then as a subtotal, minority group employees, singling out Negro, Oriental, American Indian, Spanish surnamed Americans and again broken between male and female, and then those categories are again broken by officials and managers, professionals, technicians, sales workers, office and clerical, skilled craftsmen and semi-skilled operatives and then laborers, unskilled.

Then the part B describes the titles that fit into each [156] of these job categories.

For example, under craftsmen are cabinetmakers, carpenters, engineers, etc.

The Emporium-Capwell Company is on a promotion from within basis, has been for the 35 years that I have been with the company. All officials and all managers have been promoted from within the ranks of the employees.

The first category that is reported is officials and managers, and of the total, 1145 there have been 10 male Negroes, 9 Oriental males, and 18 Spanish surnamed Americans promoted to the management level.

In the female category there have been 10 Negroes, 11 Orientals and 9 surnamed Spanish Americans.

TRIAL EXAMINER: Isn't this applicable to only The Emporium store here on Market Street here in San Francisco?

THE WITNESS: No, sir.

TRIAL EXAMINER: This is the entire organization?

THE WITNESS: Yes.

TRIAL EXAMINER: All right.

THE WITNESS: And the balance of the report then again breaks out the various job categories by male and female and then by minority group employees to a subsequent total.

Q (By Mr. Bahrs) All right. Now, you mentioned about the Emporium policy of promotion from within. Is it a normal procedure to start employees in the lowest ranks so to speak?

[157] A Normally, yes, sir, and an exception might be a skilled craftsman and in that instance he would be an apprentice probably as a beginner.

Q And are there conspicuous examples as you remember that you could tell us of people who started as stock clerks as Mr. Hollins and Mr. Hawkins are?

A Yes, I think the President and I are examples.

Q Both of you started as stock clerks?

A Yes, doing the same work as Mr. Hawkins and Mr. Hollins did. You asked for an example there.

Q Yes, please.

A The present traffic manager of the company, Mr. Emmett Powell is black, had the same job that has been referred to as stock clerk here. At high school level at the time he began work, with our assistance and encouragement he completed four years of college and now has a traffic manager degree.

During that time he was promoted, it is my recollection in the neighborhood of a half a dozen times until he reached his present consideration. He is under consideration for further promotion.

Q Is there another person who succeeded to Mr. Ehrenfried's position when Mr. Ehrenfried was transferred to the San Francisco store?

A Mr. Ehrenfried was manager of our unit in Palo Alto known as the Emporium Stanford and at the time

he was relieved [158] of those duties Mr. Andrew Howard, who is black, who has been with our company and promoted up through the ranks assumed the management of that organization where he presently directs approximately five hundred employees.

Q Now, could you describe briefly the procedures by which the employees are reveiwed and evaluated for promotion?

A Well, I think this morning's testimony brought out each six months or so on change of job every employee is entitled to an evaluation by his supervisor.

In turn that supervisor's evaluation is viewed by his supervisor. In other words, there are two levels of review. After the completion of that summary in writing then that review is discussed with the individual employee, so that he may know what his status is, whether he is achieving the goals set for him and what lies ahead for him. Not only on immediate job performance, but for merit increase or for consideration against future openings and promotion. That is at all levels for all employees.

Now, it would be done more frequently than six months if an individual had moved into a new category.

Now, there are exceptions. The only exception that occurs to me at the moment would be someone that we refer to as a temporary employee, a person on a seasonal job where we would not expect to retain the person.

However, at the conclusion of that temporary employment, [159] there would be a supervisor's evaluation of the performance of that individual.

Q Can you say whether any distinction is made in these evaluations because of the race or color of the employee?

A Well—

MR. KINTZ: Your Honor, I have not objected to the questions along these lines. I don't wish to interrupt Counsel's examination, however, I wish to make it clear that the General Counsel's case is based on the theory that these gentlemen had reasonable cause to believe or some affirmative basis to believe that racial discrimination exists. We are not seeking to try the employer for seeking to discriminate against employees because of race.

I don't think it is our business as I understand the issues at law. I do not wish the hearing to get broadened to that extent and that is why I have endeavored to offer evidence showing the state of mind of these employees rather than concentrate on litigating the subject of race discrimination of The Emporium. I hope that statement on my part may help to narrow the issues before you.

TRIAL EXAMINER: This goes to reasonable cause to believe, and this goes to whether or not they had reasonable cause to believe. Proceed.

Q (By Mr. Bahrs) Is there any distinction or difference in the evaluation of the employees based upon their race or color or creed?

[160] A Well, certainly not in the policy and the effort to carry it out. If it were to occur, then there would every effort to correct it or root it out. The answer is a categorical no.

Q As a matter of fact The Emporium has pioneered in the employment of black employees, isn't that correct?

MR. KINTZ: Objected to as calling for a conclusion and self serving declaration.

MR. BAHRS: I withdraw it.

Q (By Mr. Bahrs) Isn't it a fact that The Emporium put black sales persons on the floor before any major department store in San Francisco did so?

A Yes, sir.

Q Could you tell us please what the procedure is if The Emporium were to receive a complaint that there is a discrimination against an employee based upon race, color or creed?

A It would be referred immediately to the personnel office to collect the facts, and if they were sustained, the general manager would take immediate action to correct it.

MR. BAHRS: I think that is all.

MR. KINTZ: I have no questions, Your Honor.

MR. HECHT: No questions.

MR. BAHRS: That's all.

TRIAL EXAMINER: You are excused, sir.

(Witness excused)

FORM NLRB-501
(2-67)

Form Approved
Budget Bureau No. 64-R001.22

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 20-CA-5304

Date Filed 11-19-68

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: THE EMPORIUM

b. Number of Workers Employed: Unknown

c. Address of Establishment (Street and number, city, State, and ZIP code): 835 Market Street, San Francisco, California

d. Employer Representative to Contact: Personnel Manager

e. Phone No.: 982-1111

f. Type of Establishment (Factory, mine, wholesaler, etc.): Department Store

g. Identify Principal Product or Service: Retail Sales

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and ---------- (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about November 11, 1968, the Employer unlawfully discharged its employees Tom Hawkins and Jim Hollins, solely because of their concerted protected activity in informing the public, by peaceful, leafletting, in public places, on said employer's non-work time, of their complaint of the Employer's racial discrimination in hiring, firing, promotion and other personnel activities and attitudes.

By these and other acts the Employer has interfered with, restrained or coerced its employees in the exercise of the rights guaranteed to them in §7 of the Act.

NATIONAL LABOR RELATIONS BOARD
Docket No. 20-CA-5304 OFFICIAL EXHIBIT NO. GC 1a
Disposition: Identified a; Received ✓; Rejected
In the matter of The Emporium
Date 12-19-68 Witness Reporter
No. Pages

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Western Addition Community Organization

4a. Address (Street and number, city, State, and ZIP code): 1500 Post Street, San Francisco, California

4b. Telephone No.: 922-5757

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

None

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Jotham D. Pierce, Jr. (Signature of representative or person filing charge) Representative (Title, if any)

Address 721 Webster Street, San Francisco, Calif. 94117 567-2804 (Telephone number) November 15, 1968 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 924-934

1(a)

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UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-5304

THE EMPORIUM

and

WESTERN ADDITION COMMUNITY ORGANIZATION

COMPLAINT AND NOTICE OF HEARING

It having been charged by Western Addition Community Organization that The Emporium, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twentieth Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The charge was filed on November 19, 1968, and a copy thereof was served on Respondent on the same date.

II

(a) The Respondent is a California corporation engaged in the operation of retail stores in the State of California.

(b) During the past year Respondent in the course and conduct of its business operations made gross sales in excess of $500,000.

(c) During the past year Respondent in the course and conduct of its business operations purchased and received goods and materials valued in excess of $50,000 directly from outside the State of California.

III

Respondent is, and has been at all times material herein, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV

At all times material herein Paul Ehrenfried has been Manager of Labor Relations for the Respondent and an agent of Respondent acting on its behalf within the meaning of Section 2(13) of the Act and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act.

V

On or about November 11, 1968, Respondent terminated the following employees because of their protected concerted activities:

(a) Jim Joseph Hollins
(b) Tom Hawkins

VI

The acts of Respondent described above in paragraph V, and each of said acts, occurring in connection with the Respondent's operations described above in paragraphs II and III, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 8th day of April, 1969, at ten o'clock in the forenoon, Pacific Standard Time, in U. S. Tax Court, Room 18201, Federal Building and U. S. Court House, 450 Golden Gate Avenue, San Francisco, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right

to appear in person, or otherwise, and give testimony. Form NLRB 4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED AT San Francisco, California, this 4th day of March, 1969.

[SEAL]

/s/ Roy O. Hoffman,
ROY O. HOFFMAN
Regional Director
National Labor Relations Board
Region 20
450 Golden Gate Avenue
Box 36047
San Francisco, California 94102

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-5304

THE EMPORIUM

and

WESTERN ADDITION COMMUNITY ORGANIZATION

ANSWER OF THE EMPORIUM

Respondent, The Emporium, answers the Complaint herein as follows:

I

Admits the allegations in Paragraphs I, II, III, and IV of the Complaint.

II

Answering Paragraph V and VI

Denies that Jim Hollins was an employee within the meaning of the Act but on the contrary alleges that Jim Hollins was at all times a supervisor.

Denies all the other allegations of Paragraphs V and VI of the Complaint.

THE EMPORIUM

BY: /s/ George O. Bahrs
Attorney for the Emporium

CERTIFICATE OF SERVICE

George O. Bahrs hereby certifies that he is the attorney for the Respondent and as such he mailed on March 11, 1969, a true copy of the within Answer by depositing a true copy thereof in a United States mailbox in the City and County of San Francisco, California, said copy being contained in a sealed envelope with postage prepaid and addressed to:

Jotham D. Pierce, Jr.
721 Webster Street
San Francisco, California 94117

Western Addition Community Organization
1500 Post Street
San Francisco, California 94109

and that there is a regular mail service between the place of mailing and the place so addressed.

/s/ George O. Bahrs
GEORGE O. BAHRS

GC-2

AGREEMENT

between

SAN FRANCISCO RETAILERS' COUNCIL

and

DEPARTMENT STORE
EMPLOYES' UNION
LOCAL NO. 1100, R.C.I.A.

As an employe you are requested to cooperate with the Union and your employer jointly to carry out the terms and spirit of this agreement.

COMPANY

DECEMBER 29, 1967

• • • •

Section 1. RECOGNITION

A. The Union is recognized as the sole collective bargaining agency for all San Francisco employes employed at the San Francisco stores of the employers, except for executives as defined in Section 2 (Definition of Executives), and for the classifications listed in Appendix "B."

B. The Council is recognized as the sole collective bargaining agency for the employers.

C. "Council" means San Francisco Retailers Council.

D. "Union" means Department Store Employees Union, Local 1100, R.C.I.A.

E. "Employers" or "stores" means members of the Council and parties to the agreement.

F. Where "employer" is used in the singular it shall be deemed to refer to a single employer, member of the Council, and the context of the sentence in which it is used shall be deemed to refer to such employer's own employes

employed at a San Francisco store, or to a single employe of such employer.

• • • •

Section 3. UNION MEMBERSHIP

A. There shall be no discrimination by an employer against any employe or applicant on account of membership in or activity on behalf of the Union.

B. Those employes who are members of the Union, or who become members, must continue their membership in good standing for the life of the present agreement as a condition of employment. Those employes who complete their probationary period on January 31, 1968 and all employes hired on and after February 1, 1968, shall within 31 days following their employment, as a condition of continued employment, acquire membership in good standing in the Union.

C. "Good standing" for the purpose of this agreement shall mean that the employe shall tender in accordance with applicable law the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in the Union.

D. The employer agrees to notify the Union of all newly hired employes within 15 days of their employment.

E. The provisions of subsection B shall not apply to Christmas Extras whose work begins on and after November 15 and is completed by January 1 of the following year.

• • • •

Section 5. UNION-EMPLOYER RELATIONS

A. In the interest of promoting a harmonious relationship mutually beneficial to the Employers and the Union, the Employers agree to present all new employes, except Christmas extras, with a copy of this agreement, and such employes will be asked to cooperate with the Union and the Employers jointly to carry out the terms of the agreement.

B. Any act of any employer, representative of the Union, or any employe that is interfering with the faithful performance of this agreement, or a harmonious rela-

tionship between the employers and the Union, may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement.

C. The mutually agreeable system that has been worked out between the employers and the Union to permit the Union activities of receiving complaints and collecting dues during store hours shall be continued. It is understood, however, that such activities shall be conducted at reasonable times and so as not to interfere with the conduct of the employer's business or to interrupt or interfere unreasonably with the performance of work.

• • • •

Section 19. DISCHARGE OF EMPLOYES

A. The employer shall have the right to discharge any employe for just cause. Any employe feeling he has been unjustly discharged shall have the right to appeal such discharge through the Union within 7 calendar days of the date of discharge pursuant to Section 36 (Processing of Complaints and Disputes).

• • • •

Section 21. GENERAL WORKING CONDITIONS

• • • •

E. No person shall be discriminated against in regard to hire, tenure of employment, job status by reason of race, color, creed, national origin, age or sex.

• • • •

Section 36. PROCESSING OF COMPLAINTS & DISPUTES

A. There shall be no strike or lockout during the life of this agreement.

B. An Adjustment Board consisting of 3 representatives of the Council and 3 representatives of the Union shall consider all complaints and disputes arising from the terms of this agreement, all questions and interpretations of the agreement, and discharge cases. All discharge cases must be appealed to the Board within 7 days from

the date of discharge, otherwise the right to appeal is lost. The Adjustment Board shall have no authority to negotiate a new agreement. The Adjustment Board is expressly empowered to determine with respect to any complaint that may arise, whether or not certain types of operation now classified require an actual practice and performance of work beyond the ordinary and usual work described and referred to by said designation, or the performance of work of a special kind of skill and responsibility and, if so, to create and establish proper classification and scale for the same and, in so doing to invoke all of this section.

C. Any matter referred to the Adjustment Board shall be taken up by the Board within 7 days after written notice by either party. If the Board is unable to reach a settlement within 7 days thereafter, either party may request arbitration of the issue, or issues, within 14 days following the date the Adjustment Board reached an impasse and was unable to resolve the dispute by giving written notice of such request to the other party. Upon such request the matter shall be submitted for disposition to an impartial arbitrator mutually agreeable to both parties. If neither party gives such notice to the other party within 14 days following an impasse of the Adjustment Board on the disputed issue, or issues, the right to submit the complaint, controversy or dispute, or disputes, to arbitration shall be considered waived.

D. The impartial arbitrator shall be selected by agreement of the parties. In the event the parties are unable to agree upon an arbitrator, he shall be selected by lot from among the following: Messrs. Robert E. Burns, Sam Kagel, Hubert Wyckoff, Joseph Gabarino and Howard Durham. No arbitrator shall be chosen to serve in two consecutive arbitrations unless by mutual consent of the parties.

E An arbitrator shall have no power to add to, subtract from, change, or modify any provision of this agreement, but shall be authorized only to interpret the existing provisions of this agreement and apply them to the specific facts of the complaint or dispute.

F. Any decision made by a majority of the Adjustment Board, or as a result of arbitration, shall be accepted as final and binding. Any expenses incurred as the result of arbitration shall be borne one-half by the Union and one-half by the employer.

* * * *

Section 38. TERM

A. This agreement shall be effective from June 1, 1967, and shall remain in effect to and including May 31, 1972, providing that either party by 60 days prior written notice to the other may reopen this agreement on June 1, 1970. Such reopening shall be limited to the following issues and no others:

(1) Wages, straight-time hourly rates of pay.
(2) Vision care benefits.
(3) Pension benefits.

* * * *

C. The parties hereto agree that all issues between them are settled by this agreement for the full term thereof excepting those reopenable issues hereinabove specified.

For the Union:

/s/ Walter L. Johnson, Sec-Treas.

For the Council:

/s/ Vincent H. Brown

* * * *

APPENDIX "B"

Artists
Barbers
Beauticians
Busheling Operations
Cabinet Makers
Carpenters
Copywriters
Culinary Employes
Deliverymen—Outside
Displaymen
Drapery Workers
Electric Data Processing Programers-Operators
Electricians
Elevator Constructors
Elevator Operators
Engineers
Executive Trainees
Floor Covering Layers
Fur Workers
Furniture Finishers
Garage Employes
Guards
Janitorial Operations (Janitors, Matrons, Maids, Handymen)
Laborers
Painters
Patrick employes except salespeople in retail store
Personnel Interviewers
Personnel Office Clerks
Pharmacists
Plumbers
Printers
Radio & TV Servicemen
Registered Nurses
Secretaries to executives above level of department manager
Shoe Repairmen
Shoe Salespeople
Special Officers
Store Detectives
Teamsters
Teen Board Members
Warehouse Department Operations (Shipping and/or Receiving Clerks; General Department Store Warehousemen)
Watchmen
Window Washers

* * * *

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON ! ! !

For years at the Emporium black, brown, yellow and red people, have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

Tom Hawkins
Dept. 80-302
725

On November 2, 1968, you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

/s/ [Illegible]
The Emporium

[Refused to sign]
/s/ H. R. Henderson
Employee

Date: 11-7-68

cc: Employee's File
Employee
Local 1100

Attachment (1)

Copy given to Mr. Hawkins.

/s/ [Illegible]

** BEWARE **** BEWARE **** BEWARE **

EMPORIUM SHOPPERS

"BOYCOTT IS ON" "BOYCOTT IS ON" "BOYCOTT IS ON"

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We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor Peoples Institute.

Printed for the People — By the People of:

THE WESTERN ADDITION COMMUNITY ORGANIZATION
(W.A.C.O.)
1500 Post Street
San Francisco, California 94109

GC-7

April 11, 1968

Report on Emporium Stock and Marking Areas

This report is a summary of information gathered from two meetings; one meeting was held with the portion of Local 1100 membership that are involved in Stock and Marking areas in the Emporium and includes not only the Downtown Store but the Service Building as well. Since this report is in an abbreviated form it will be necessary to discuss much of the content orally with management and union members.

The first meeting which was held on April 3 was an outgrowth of a number of problems that had developed in Stock-Marking areas. The officials of the Union scheduled the meeting so that they could properly represent the members. A committee was selected at the April 3 meeting which is to serve as both a group of Stewards and a committee to help work out present problems and to continue to serve when non-selling classifications are discussed.

The committee met. The following points were agreed upon by the committee to be submitted to the employer. Of course it should be looked upon as a first report. It is hoped that the Personnel Department of the Emporium will join with Local 1100 officers and members to create a better atmosphere in the Stock-Marking areas:

(1) One of the basic problems is the shortage of help. Because of the shortage of help, the employees of the Emporium are required to do more than one job. Apparently when individuals leave the Emporium they are not immediately replaced and in some cases are not replaced at all. It was the general feeling of all present that the workload has increased over the years and will continue to increase unless something is done to supply more help. While the store continues to operate in these areas with fewer employees it is a well known fact that business is increasing therefore the cost of labor most likely

does not increase in relation to the amount of business that is done in a year's time.

The lack of an adequate number of workers creates additional problems that appear to be violations of the contract.

(a) It is reported that executives are doing work that would normally fall in the union's jurisdiction. This is not on an intermittent basis. It is our understanding that the executives carry out duties that should be handled by other employees on a regular basis either for a number of hours a day or at least a few hours a day. This action on the part of executives apparently serves as a "safety valve" that prevents an explosion by doing just enough work to get by. Because they do not fulfill the requirements of a full-time worker, the additional workload seeps over on to the members of Local 1100. It is the Union's intention to bring this matter to a proper conclusion so the lines of demarcation are clearly drawn.

(b) Another long standing complaint has been the requirement of stock workers to do janitorial work. While it had been continually reported by the Emporium that this was done as a security measure, I do not believe that such a claim can be substantiated by regular janitorial work. The union would have no objection if the stock people were required to take care of a small area at the close of the day for the sake of neatness. However the reports that we have received are that there are some people doing janitorial work on a regular basis. This we cannot accept and I am sure it would be difficult to convince the janitors that they were a security problem.

Therefore it is the position of the union that janitorial work should be done by janitors and stock work should be done by stock workers, the exception being work for clean up for a short time at the end of a work day. This problem

again arises because of the shortage of help in the stores.

(c) The workers in these areas are faced with the problem of a different sort, that is conflicting directives given by different executives. They want to know who their supervisor is and what authority he or she has. It should be easily understood that production is greatly affected by the interruption of normal duties by executives, etc., who request that different duties be performed than those that were assigned by a supervisor. This problem along with those previously mentioned is not raised to be a point of contention. It springs from the simple fact that the members feel that they should be allowed to do their work in a workman-like fashion. It is their feeling that the interruption caused by executives doing additional duties, etc., undercut any program of efficiency that the Emporium may have.

The foregoing points begin in our opinion from the lack of an adequate number of workers.

(2) It was also mentioned at the meeting that overtime is not equitably divided. It appears that supervisors get first choice and then those who happen to be in good standing for the moment are favored by overtime hours. Also a complaint was raised regarding adequate notice regarding overtime work. In one case a member was asked on April 6 at 4:40 p.m. to work overtime on April 7th.

(3) The point was also raised by the members that there is no telephone emergency service and that supervisors determine what calls should go through and be relayed to the members. It is our feeling that certainly in cases of emergency, individual employees should be notified and should be allowed to take calls. In the Service Building they do have a pay phone handy and it would appear that this could be done at the Downtown Store also.

(4) We discussed the layoff of markers after the busy season. It appears that there are jobs available that markers could do but they are given to people with less seniority. This conflicts with the storewide seniority provision of the contract. It should not be the responsibility of the member to request the work, this should be handled by assignment, keeping first in mind that *seniority is storewide.*

Much discussion took place during the 1967 negotiations regarding the term "where qualified". After the discussions were held, the term was changed to "for which they have qualifications". The assignment for work should be on this basis and we are sure that if this is followed, more people will be properly placed and not suffer a loss in employment.

(5) The matter of dress regulations was also discussed. It appears that the female employees in marking areas are required to wear street wear clothing. This results in the loss of much money in the purchase of nylons, etc. The people feel that either smocks should be provided and also that the wearing of slacks should be allowed. Since these areas are away from where the public would see the employees, there should be no objection to the wearing of slacks as they protect against cuts and scratches.

It was also mentioned that the marking room area is not known for its cleanliness and there is much dust and it has been some time since the floors have been scrubbed. On the question of adequate restroom facilities, it was noted that some of the areas had equipment that was out of order and in general the overall situation was less than desirable.

(6) Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of

almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

It was further mentioned by the Stewards and the Committee that most of the minority people were disgusted and were looking for other jobs. They feel that they are entitled to more than a job; that they should have the same opportunity to advance as other employees do. It is their feeling and the feeling of Local 1100 as well, that one of the most important areas that should be looked into is a program that provides for upgrading of employees.

To our knowledge there is no program of training or otherwise presently in effect at the Emporium that would serve as a vehicle to assist in advancement to better positions. Cases were mentioned where people were brought in from other areas or other departments to work with the Negro employees in order that they may learn their job and then these individuals would end up with the higher position. In the opinion of the writer it would appear that a general situation at the Emporium could become an explosive one unless mutual efforts are made to correct the inequities mentioned and to provide an adequate work staff.

As an example of individuals not having an opportunity to advance let us take a look at the situation involving Russell Young. Russell Young has an excellent record and although he has indicated that he would like to advance at the Emporium, after several years of faithful performance during which time he demonstrated an ability to do his work and to help train others, he has not had the opportunity for advancement. It would appear on the surface at least that there are approximately ten available jobs in the stock area that become available through turnover alone. These would involve the working supervisor. It also appears that there would be approximately five openings per year for assistant manager. Taking all of the foregoing into consideration it certainly seems that it would be possible for some of the people to expect advancement and that the jobs should

not be given out to those who come in from the outside or from different areas.

Additional meetings have been held and more will be held on this problem, however we felt it necessary that we reduce to writing some of the points to be submitted to the Emporium. This document has been read by the committee that was selected at the April 3rd meeting.

In many cases it is difficult to put into writing the exact situation that may exist in a department or departments. It is also difficult to convey the feeling or attitude of one individual toward another. In the areas that we are presently discussing it would appear that the points listed have a great deal of validity, mainly because they were agreed upon almost 100% by those present at the various meetings.

If the Emporium Personnel Department immediately goes into a defense posture it will only serve to heighten the problem.

It is recognized by all of those that attended the meetings that we cannot change everything in a day's time. Both the Union officers and the members realize that a journey of a thousand miles begins with but a single step. It should be also apparent that any journeys from here on in cannot be walked alone. The miles must be walked together and this should include not only the store and the union, but the members as well.

In conclusion, while most of these problem areas can be discussed with the members of Local 1100, the Emporium and the Business Representatives and Officers of Local 1100, it seems that if we are to properly take care of some of the problems, namely, warehouse work and janitorial work, it will be necessary to involve other Unions.

Respectfully submitted,

/s/ Walter L. Johnson
WALTER L. JOHNSON
Secretary-Treasurer
Local 1100

WLJ:gp
ope-3-afl-cio(87)

Jim Hollins
Dept. 80-302
3544

On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.

On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.

/s/ [Illegible]
The Emporium

[Refused to sign]
/s/ H. R. Henderson
Employee

Date: 11-7-68

cc: Employee's File
Employee
Local 1100

Attachment (1)

Copy given to Mr. Hawkins.

/s/ [Illegible]

BRIEFING ON CONDITIONS

1. We are representing Black, Yellow, Brown and Red people. These are people who are not being treated like human beings.

I myself have been employed for 2 years at the Emporium, and have never been treated with true respect. I have worked on different areas to help train other persons supervise a floor, was harrassed and told I could leave if I was not satisfied. They also told me that they were going to fire me.

2. Blacks have to prove themselves more than others, cut their hair, lose their culture and try to emulate the White establishment of the Emporium.

3. There are no Black buyers, Divisionals, Upper Management, nor, are there any personnel upper management.

On April 3rd, the local 1100 had a meeting, called by the employes of the Emporium. This meeting was for the working conditions, and the discrimination of Blacks.

(a) On April 3rd, these issues were discussed but conditions did not get any better.
(b) Meetings were promised, but never came about.
(c) Sept. 3rd, a meeting was called to express the difference of Black, Yellow, Brown and Red people with management, charging discrimination again.
(d) The Union stated they were passing the Emporium up. (Con Game)
(e) The Union tried to break down the group into individual cases.
(f) The Union itself was covering up for the racist Emporium.
(g) Oct. 18th. we went to the retailers council. This was another smoke screen to break down into individual cases.

cont'd.

PETITION

We covered a floor to floor investigation of the Emporium's, selling and non selling areas. The following

imformation was given from Black, Brown, Yellow and Red people, who have been employed for a number of years there. We feel that this is a clear and direct charge of discrimination on the part of the Emporium.

* * * *

My name is Carleton Allen Washington;

A. On the afternoon of Oct. 18th, 1968, I conducted an investigation of the High Fashion Department of the Emporium on the second floor.
The investigation steemed from over mounting complaints of shortage of Blacks, Mexicans, Filipinos, Chinese, and Spanish selling personnel, buyers, assistant buyers and department sales managers.

On the conclusions of my investigation, I came up with the following information about this Exclusive High Fashion Area.

B. 1. Dept. 400—Furs $100.00 and up. All White personnel.
2. Dept. 358—Wedding Gowns and Formals. All White personnel.
3. Dept. 398—Maternity Clothing. All White personnel.
4. Dept. 490—Uniform Shop. All White personnel.
5. Dept. 321—Coligiant Coats. All White personnel.
6. Dept. 300—Womens Suits, $150 & under. All White personnel.
7. Dept. 450—Womens Bras. and Girdles. One Black assistant.
8. Dept. 375—Robes and Bras. All White personnel.
9. Dept. 311—Expensive Women's Coats $60.00 & up. All White.
10. Dept. 381—Women's Pants, Blouses, and Coats, expensive, all White personnel. (Items 8-10, are in the Downtown Branch of the Emporium.)

The only Department with any Black, Filipino selling personnel are as follows;

C. 1. Dept. 412—Women's hats, wigs. One Filipino.
2. Dept. 378—Women's pants, 1 Black, 2 Filipino and 1 Chinese.
3. Dept. 379—Women's pants, 1 Black, 0 " and 0 "
4. Dept. 440—Women's Night Gowns, Bras & Panties. 1 Black, 2 Chinese and 1 Mexician.
5. Dept. 480—Women's Robes (expensive) 1 Black personnel.
6. Dept. 371—Women's Coats amounting up to $185.00 1 Black personnel.

D. Out of the total Blacks, Filipinos, Chinese and Mexician, only 5 are Black, 3 Filipino, 3 Chinese and 1 Mexican this amounts to 12 in all.

E. We demand that all of these specific racial groups be infilitrated into the areas where the commission is the highest. The second floor.

There are no Black, Mexican, Filipino, Chinese, selling personnel in the following high commission areas . . .

1. Department 611-613; this department has no minorities selling personal. This department sells Oriental Rugs, Wall to Wall Carpetings, amounting to nothing under $200.00.
2. Department 713; this department also has no minorities (Black, Mexican, Filipino or Chinese,) selling personal. This department sells $200-$300.00 Record Players, Tape Recorders, etc.
3. These departments on the third floor 712 are selling such items as Radios, Colored Television, and Black and White T. V. sets and Steros. These items amounting up to $1,100, and there are no Black, Mexican, Filipinos or Chinese personal.
4. There are none of the before mentioned minorties selling in the following areas:

a—Washers, Dryers, Dishwashers, $100.00 up-
b—Furniture, Livingroom Sets, Bedroomsets, or Dinnettesets $200.00 and up.

c—On the whole third floor selling area, only four Black persons, 2 Filipinos, 3 Chinese and no Mexicians.

We demand selling personal of the following Racial groups to be infiltrated into the following high commission selling areas. Black, Mexicians, Chinese, Filipinos etc.

1. Radio, T.V., Stereos.
2. Tape Recorders and Record Players.
3. The whole furniture department.
4. The appliance department, selling Washers, Dryers, etc.
5. Selling Rugs in Department 613-611.

• • • •

September 4, 1968

Mr. Vincent Brown
San Francisco Retailers Council
260 Stockton Street
San Francisco, Calif. 94108

Dear Mr. Brown:

Department Store Employees Union has made every effort to resolve the grievances raised with The Emporium regarding matters concerning our members employed in the stock and marking areas.

Apparently we have been somewhat less than successful in our efforts and it appears the only recourse we have is to request a meeting of the Adjustment Board to hear the entire case. This communication will serve as our request for a meeting of the board.

We specifically charge the Emporium with violations of Section 5 B and 21 E, of the Agreement between the San Francisco Retailers Council and Local 1100. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.

We are ready to proceed to immediate arbitration if The Emporium is agreeable.

Would you kindly contact me in order that a mutually convenient date may be agreed to.

Thank you,

Yours truly,

WALTER L. JOHNSON
Secretary-Treasurer

WLJ:f
OPE-3-AFL-CIO(87)

Standard Form 100 (Revised)
January 1972
Approved 809-124-R0002
100-165

EQUAL EMPLOYMENT OPPORTUNITY

EMPLOYER INFORMATION REPORT EEO-1

DE-1

JOINT REPORTING COMMITTEE
- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance
- Plans for Progress Program

TOTAL

PART II—REPORTING UNIT REPORT

Part II must be completed and filed in duplicate by all employers required to submit employment data (all who have answered "Yes" to any one of questions 1, 2, 3, or 4 of Section B on Part I—Company Report). A separate Part II must be filed for each Reporting Unit of a Multi-establishment Employer, including a Part II Consolidated Report summarizing the data for the entire company. A Single-establishment Employer must file one Part II with its Part I form. A list of Reporting Units for which reports were filed last year is enclosed with the forms mailed to all Multi-establishment Employers. The list contains a 6-digit EEO-1 Control Number that has been assigned to each Reporting Unit. For Single-establishment Employers the EEO-1 Control Number is shown on the address label attached to the first Part I form.

See Instructions

Section F—REPORTING UNIT IDENTIFICATION

(To be answered in full. Insert EEO-1 Control Number assigned to this Reporting Unit in item 1c. If this is a new Reporting Unit, write "New Unit" in 1c. Leave 1c blank only if you did not file last year.)

OFFICE USE ONLY

7b, 8, 9b(1) 1. Reporting unit for which this report is filed. (If a combined report covering two or more units, please indicate and identify the area covered by the combined report.) — j

a. Name of reporting unit: EMPORIUM-CAPWELL COMPANY — k

Address (Number and street)	City or town	County	State	ZIP code	
835 Market Street	San Francisco	San Francisco	Calif.	94103	l

11f, 11m b. Employer Identification No.: 9 4 0 4 5 7 9 0 7 — c. EEO-1 Control No. — m

Section G—EMPLOYMENT DATA

1. Employment of this reporting unit.—Report all permanent, temporary, or part-time employees unless specifically excluded as set forth in section 11f of the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros. (See section 9b(2) of the instructions on how to fill out this table, and section 10 for a description of the job categories.) In columns 1, 2, and 3, include all employees in the reporting unit, not merely those in minority groups.

1, 2, 3, 14 / 9b(2) / 10 Job categories	ALL EMPLOYEES			MINORITY GROUP EMPLOYEES							
				Male				Female			
	Total (Col. 2+3) (1)	Male (2)	Female (3)	Negro (4)	Oriental [1] (5)	American Indian [1] (6)	Spanish Surnamed American [1] (7)	Negro (8)	Oriental [1] (9)	American Indian [1] (10)	Spanish Surnamed American [1] (11)
Officials and managers	1145	538	607	10	9		18	10	11		9
Professionals	66	27	39		1		3				
Technicians	20	20			1						
Sales workers	2898	332	2566	11	7		14	102	47		105
Office and clerical	827	30	797	6	3			36	59		57
Craftsmen (Skilled)	76	75	1	1			1				
Operatives (Semi-skilled)	143	64	79	1	3		5	6	5		5
Laborers (Unskilled)	372	207	171	24	7		25	16	9	1	22
Service workers	632	227	405	23	10		51	37	23		37
TOTAL →	6179	1514	4665	76	41		117	207	154	1	235
Total employment from previous report (if any)	5851	1435	4416	58	40		136	192	122		238
(The data below shall also be included in the figures for the appropriate occupational categories above)											
On-the-job trainees [2] White collar	47	19	28	1							
On-the-job trainees [2] Production											

[1] See explanation of "minority group identification" in section 9b(2) of the instructions. The term, "Spanish Surnamed American," includes all persons of Mexican, Puerto Rican, Cuban, or Spanish origin. The term, "American Indian," does not include Eskimos and Aleuts.

[2] Report only employees enrolled in formal on-the-job training programs.

NATIONAL LABOR RELATIONS BOARD

Docket No.

Disposition: Received

Posted

In the matter of The Emporium DLB

April 6 69

No. Pages

120

SUPREME COURT OF THE UNITED STATES

No. 73-696

THE EMPORIUM CAPWELL CO., PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION

ORDER ALLOWING CERTIORARI. Filed February 19, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 73-830 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 73-830

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed February 19, 1974.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 535043 214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent,

and

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
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vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Respondent Western Addition Community Organization, which filed the unfair labor practice in this matter to protest the discharge of its two black members, Tom Hawkins and James Joseph Hollins, sub-

mits this brief in opposition to the two above-captioned petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

QUESTION PRESENTED

Whether the court of appeals properly decided that, upon the facts in this case, employees' concerted activity—peaceful distribution of leaflets protesting their employer's racially discriminatory employment practices—did not lose the protection of the National Labor Relations Act because the employer was party to a collective bargaining agreement.

STATEMENT OF THE CASE

Because the decision of the court of appeals below depends so heavily upon "the particular facts of this case," (Pet.App. 18-19)[1] certain of those facts, omitted or obscured in petitioners' briefs, are set out here.

In analyzing the employees' concerted activities in this case, the court below laid special emphasis upon the chronology of events which culminated in their

[1]"Pet.App." refers to the appendix to the petition of The Emporium Capwell Company in No. 73-696, O. T. 1973, seeking review of the subject judgment. Because the decision below is not yet reported, references are made to the court's decision set out in the appendix to the Emporium's petition, "Pet.App.". "A." refers to the appendix to the briefs in the court below; a copy has been filed with the Clerk of this Court.

actions. The analysis included two elements: the persistent attempts made by employees, over a seven month period, to enlist the union in their efforts to eliminate employment discrimination at the Emporium and, secondly, the union's response, over the same period, to these entreaties. Description of these events establishes the good faith nature of the employees' protest, their consistent attempts to work through their union, the union's inadequate response and their eventual conclusion that they needed to act to supplement the union's efforts. On the facts, then, the court below found the employees' concerted activities to be amply justified and hence statutorily protected.

In early spring of 1968, Hawkins, Hollins and other minority employees at the Emporium began to accumulate evidence of the company's racially discriminatory personnel practices (A. 233, 234, 134). In a series of meetings in early April, the minority employees turned much of this evidence over to their union and requested that the union promptly take the necessary steps to remedy the discrimination (Pet.App. 3-4). The employees initiated additional meetings with the union in May (Pet.App. 4) and, again, in September (Pet.App. 5), but it was not until October 16 that the union-management Adjustment Board met to consider the employees' complaints (Pet.App. 6-7).

Not only were the employees forced to wait seven months for the meeting to occur, but—of more importance—the union structured the meeting in such a way that the employees' objectives could not be re-

alized.[2] Accordingly, as the court below stated, the minority employees ". . . read a prepared statement objecting to the presentation of grievances on an individual basis. Those employees did not want to 'speak as individuals', but would act only 'as a group'" (Pet.App. 7). Recognizing the impossibility of achieving satisfactory results through the Adjustment Board and having lost seven months' time trying to work through the union, the employees eventually determined to press their objectives through their own orderly distribution of leaflets to the public (Pet. App. 7-9).

Even though the union's efforts to eliminate discrimination at the Emporium were inadequate, it is important to understand that the union fully subscribed to the employees' goals and, in fact, did not oppose the employees' eventual recourse to leafletting. As early as April, "it became the 'official' position of the union that discrimination against employees belonging to minority races existed in Respondent's [Emporium's] San Francisco store" (Pet.App. 81). The union never retreated from that position.

Nor did the union ever object to Hawkins and Hollins when, in September, they expressed the need for

[2]The court's opinion sets out part of the union's letter requesting the meeting of the Adjustment Board (Pet.App. 6). An earlier portion of that letter refers to the subject grievances as "matters concerning our members employed in the stock and marking areas" (Pet.App. 83). Hawkins and Hollins both worked in the Emporium's "stock and marking areas" (although Hollins was not a union member). Thus the union prepared at the Adjustment Board meeting to confine its attention to employees in only one department in one store in the company and viewed the employees' complaints as individual, not class, grievances.

more immediate and effective action (Pet.App. 6). The union, of course, felt that its organizational options were circumscribed, that is, confined to pursuit of the Adjustment Board and arbitration procedures, by the provisions of its collective bargaining agreement *(ibid)*. On the other hand, the union's principal officer testified that he told the minority employees that "'if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals'" *(ibid)*.

Consistently with this advice, the union never tried to stop the employees' leafletting when it finally occurred. At least two union officials observed Hollins, Hawkins and the other minority employees while they were handing out leaflets, cautioned them that they were jeopardizing their jobs and expressed their concern that, as one official put it, "I didn't want to see them get fired" (Pet.App. 9-10, A. 134). At no time did the union even suggest that the employees' goals or methods were antithetical to or disruptive of the union's. In fact, once the employees had been discharged, the union filed grievances on their behalf (Pet.App. 10).

The Board's Decision

A three member majority of the Board, summarily adopting its trial examiner's decision, stated that:

> Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected because in derogation of the duly designated exclusive bargaining representative. For the reasons stated by the Trial

> Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act.
>
> (Pet.App. 55, n. 2).

Two members of the Board dissented in separate opinions (Pet.App. 56-77).

The Court's Decision

The court of appeals reversed the Board's decision, finding that the minority employees' activities, admittedly "concerted" within the meaning of the National Labor Relations Act, were also "protected" and their discharges thus prohibited. After stating the facts and reviewing the applicable labor law principles and cases, the court noted the Board's failure to take cognizance of the important national labor policy to eliminate racial discrimination in employment (Pet. App. 19-22). In the context of this policy, the court found, contrary to the Board, that the employees' activities provided only limited interference with the union's exclusive bargaining representative status (Pet.App. 22-29). The court discussed the doctrine of exclusivity and noted that the purposes and principles underlying the doctrine have little applicability in cases where, like this one, the employees' goal is the elimination of racial discrimination in employment (Pet.App. 23). In this connection, the court emphasized the employees' elaborate attempts to rely upon the union for resolution of their grievances; the

fact that the union and the employees were not working at cross-purposes; and the union's refusal to handle the grievances on a "class" basis as the employees requested. On these facts, the court held that a proper accommodation of the Labor Act to the overriding national labor policy required protection of the employees' activities. The court remanded the case to the Board to consider an issue which it had expressly declined to address:[3] whether the language contained in the employees' leaflet was so disloyal to their employer as to lose the Act's protection.[4]

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PROPERLY APPLIES WELL ESTABLISHED PRECEDENT TO THE FACTS OF THIS CASE.

The fulcrum of the lower court's opinion is its observation that ". . . the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, co-existing and perhaps

---

[3]The Board's characterization of the court's remand seems incorrect (Board's Pet. 12). The court twice stated the nature of its remand as limited to "the issue of disloyalty" (Pet.App. 19, 29). While the Board asserts in its brief that the remand is directed at an evaluation of the union's efforts to remedy discrimination (Brief at 12), a fair reading of the decision below indicates beyond doubt that the court itself has made that evaluation, on both a legal and factual basis.

[4]The disloyalty question must be answered, as the court appreciated, in light of this Court's rule in *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Thus, this issue, like every other issue in this case, may be resolved by application of established precedent of this Court. Nonetheless, the court apparently deemed it inappropriate to resolve the issue without benefit of the administrative agency's expertise.

inconsistent policies embodied in other legislation" (Pet.App. 21). Thus the court enunciates the principle of statutory accommodation firmly established by this Court in the leading case of *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942) and its progeny. Consideration of the record compels the conclusion, reached by the court, that the Board unfortunately failed to heed this familiar doctrine of statutory accommodation.

The Board's trial examiner, and the three member Board majority, focused single-mindedly on the question of exclusivity: whether the employees' leafletting activities affected the union's status as exclusive collective bargaining representative. Thus, while the Board presumably intended to implement the exclusivity doctrine in the Labor Act, it utterly failed to consider other significant national labor objectives. But as this Court has said, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives", *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942). Indeed, as the court below recognized, the Board totally failed to observe the objectives of Congress, the courts and the Board itself in establishing the right to employment free from racial discrimination.

As long ago as 1938, this Court declared "the removal of discrimination . . . by reason of race" to be a paramount objective of our national labor policy, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552,

561 (1938). More recently, this policy has been enacted into law by Congress, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*[5] And, of course, this Court has been emphatic in stating that, in employment, ". . . discriminations based on race alone are obviously irrelevant and invidious", *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203 (1944).

The "duty of fair representation" policies embedded in *Steele* have long been equally applicable in cases under the Labor Act, *e.g., Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). These cases established a union's duty to oppose and to remedy employment discrimination and, concomitantly, the employees' right to insist that that duty be effectively discharged, *United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126, *cert. denied*, 396 U.S. 903 (1969).

Within this framework, the court of appeals examined and "recognize[d] the important role played by

---

[5]Passage of Title VII did not, as the Board asserts in its petition, remove to the E.E.O.C. exclusive authority to remedy employment discrimination. Thus the Department of Justice memorandum, prepared during the course of Senate debate on Title VII and cited by the Board, p. 17, contains the following statement:

> Of course Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction.

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission) 3244. Senator Clark, who introduced the memorandum, therefore stated, regarding Title VII, "It would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws," *id* at 3245.

the exclusivity principle in collective bargaining and [felt] that our decision here in no way hampers that role" (Pet.App. 19). In reaching this conclusion, the court found it significant that the employees' protest had a good faith basis,[6] that they had conscientiously tried to rely upon the union and that the union and employees had not been working at cross-purposes. On this last point, the Board's failure to consider Title VII was particularly critical, for that law expressly sanctions both the employees' goals and their methods, 42 U.S.C. §2000e-3(a). Hence, the union could legally object to neither. Indeed, as the facts described earlier in this brief demonstrate, the union did not object.

In addition, regard for the law against employment discrimination makes plain the inadequacy of the union-structured Adjustment Board meeting. The union's failure to appreciate the "class" nature of discrimination in significant part justified for the court

[6]*Cf. McDonnell Douglas Corporation v. Green*, 93 S.Ct. 1817, 1825 (1973), "Other evidence that may be relevant to [determining the reason for the employee's discharge] includes . . . the petitioner's [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful . . ." The Emporium's EEO-1 form, prepared by the company and documenting, by job category and by race, the Emporium's racially discriminatory employment practices, is part of the record (A. 230).

The Board's reference to *McDonnell* is misleading, Pet. at 18. Employee Green in that case had committed and pleaded guilty to criminal trespass upon his employer's premises. The Court's use of the phrase "unlawful, disruptive acts," 93 S.Ct. at 1825, refers to such criminal conduct and has no legitimate application to the kind of orderly, peaceful conduct in which Hawkins and Hollins engaged.

the employees' decision to abandon the union's grievance procedures.[7]

Finally, as the court below explains, even without regard to cases involving racial issues, the Board's "exclusivity" decisions, as reviewed by the courts of appeals, require the Act's protection of Hollins and Hawkins. Some circuits have protected employee action so long as it supported the union's position, *e.g., N.L.R.B. v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964). Other circuits have insisted that, in addition, the employees' activity may not be "disruptive of the concept of orderly collective bargaining," (Pet.App. 17) *e.g., N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969).[8]

Under either test, the employees here deserve the Act's protection. The union's position, as previously described, was to recognize discrimination at the Emporium and to seek to remedy it. Unlike *Tanner,* the employees here attempted to utilize the union. Neither did the employees subvert the union nor undermine its role as often occurs in "wildcat" strike situations. In short, the court found that the employees' concerted activities were justified, reasonable and entitled, under any test, to the protection of the Labor Act.

[7]"[R]acial discrimination . . . is by definition class discrimination." *Huff v. N. D. Cass Co. of Alabama*, ... F.2d ..... (5th Cir. 1973) 6 EPD ¶8800 at p. 5438; *Georgia Power Co. v. E.E.O.C.*, 412 F.2d 462, 468 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Jenkins v. United Gas Corporation*, 400 F.2d 28 (5th Cir. 1968).

[8]See section III *infra* for more extended treatment of *Tanner.*

II. THE COURT OF APPEALS' DECISION IMPOSES NO UNDUE BURDEN ON THE BOARD

The Board's brief pleads that the lower court's decision leaves the Board with "a standard that would be practically impossible to administer," Pet. at 20. Presumably such impossibility refers to the task of reviewing the facts of a case to determine when union efforts to eliminate discrimination are so slight and ineffective as to warrant complementary steps by employees. In fact, the Board commonly makes just such "sensitive" determinations all the time.

The present case should be seen simply as another in the long line of "duty of fair representation" cases, *e.g., Steele v. Louisville & N.R. Co.,* 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944); *The Wallace Corporation v. N.L.R.B.,* 323 U.S. 248 (1944); *Ford Motor Company v. Huffman,* 345 U.S. 330 (1953); *Vaca v. Sipes,* 386 U.S. 171 (1967). Such fair representation cases are legion; the present litigation involves precisely the considerations operative in all of them. All have been, and are, administratively manageable.

Indeed there are numerous examples of N.L.R.B. and court adjudication involving "sensitive and delicate considerations," Pet. at 20, which arise under the Labor Act. Apart from fair representation cases, §8(a)(5) duty-to-bargain issues and complaints stemming from union election campaigns, among others, require close attention to the realities of industrial life and, like the present matter, ought to invoke the kind of reasoned expertise which an administrative agency is designed to provide.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE OPINIONS OF TWO OTHER CIRCUITS

The Emporium's petition suggests that the instant decision conflicts with those in two other circuits. This is not true.

N.L.R.B. v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969) involved two (white) employees who were discharged for picketing their employer in protest over its racially discriminatory hiring practices. As the court below recognized, however, "The two employees had not attempted to utilize their union representative to remedy the situation, and the union's position on their claims was not known." Pet. App. 17. The facts of the two cases, then, are markedly different and the court below took care to point out its agreement with *Tanner* and its reliance upon the facts in the record before it. Indeed, *Tanner* seems to have anticipated the present case, to have stressed the *Tanner* employees' failure to invoke their union's processes and sanction, and explicitly to have refrained from undertaking "to resolve the problem of whether minority members [who had pursued each step that Hawkins and Hollins took] would then be entitled to undertake to achieve their lawful objective by dealing with the employer individually." 419 F.2d at 221.

Moore v. Sunbeam Corporation, 459 F.2d 811 (7th Cir. 1972) is simply inapposite. The principal question in *Moore* was interpretation of the collective bargaining contract. "The critical issue here is whether Moore's conduct violated . . . the agreement between

Sunbeam and the union," 459 F.2d at 816. While Moore was black, considerations of race were only peripherally raised. The Title VII discussion involved purely procedural matters.

CONCLUSION

For the reasons stated above, respondent respectfully prays that the petitions for a writ of certiorari be denied.

Respectfully submitted,

KENNETH HECHT,
COREY Y. S. PARK,
EDWARD H. STEINMAN,
LEE M. MODJESKA,
Attorneys for Respondent.

January, 1974

Supreme Court, U. S.
FILED
APR 26 1974

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER THE EMPORIUM CAPWELL CO.

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The Emporium Capwell Co.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER THE EMPORIUM CAPWELL CO.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (Pet. App. 1-53) is reported at 485 F.2d 917.

The decisions of the National Labor Relations Board (Pet. App. 54-77) and of the Trial Examiner (Pet. App. 78-106) are reported at 192 N.L.R.B. No. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973. The time for filing this Petition for Certiorari was extended to October 27, 1973, and the Petition was timely filed. The Petition was granted on February 19, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge employees who, during good faith efforts by their union to eliminate alleged racially discriminatory employment practices through the grievance and arbitration procedures of the collective bargaining contract, insisted that the company bargain directly with them to eliminate those practices and, upon the company's refusal to do so, picketed the company and urged customers to boycott it.

STATUTORY PROVISIONS INVOLVED

Sections 7 and 9(a) of the Labor Management Relations Act (LMRA) are fully set out in the Petition for Certiorari, App. 108.

The pertinent section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) is set out fully in the Petition for Certiorari, App. 109-110.

STATEMENT OF THE CASE

In 1968 several department store employees complained to their union, Department Store Employees' Union, Local No. 1100, R.C.I.A., of alleged racial discrimination by their employer, The Emporium Capwell Co., the Petitioner here. The contract prohibited such discrimination. The union agreed to, and did, investigate and prosecute their grievances.

Two of the employees disrupted the ensuing adjustment board proceedings where the union was presenting evidence in support of their individual charges of discrimination. The employees had been urged by representatives of the Equal Employment Opportunity Commission of the United States (EEOC) and the California Fair Employment Practices Commission (FEPC) to pursue the contractual grievance procedures. There was no evidence that their grievances were not being vigorously processed on an individual basis. Nevertheless, they refused to give testimony, walked out of the hearing, and as self-appointed representatives of all minorities demanded

to bargain with the president of the Emporium on a group basis. They held a press conference and engaged in picketing and handbilling, using vituperative language throughout, referring to slave conditions at the Emporium and characterizing the employer as a racist pig. Continuing their activities after two warnings, the employees were terminated.

The Trial Examiner and the NLRB held that the activities were not protected by the Labor Management Relations Act. The Court of Appeals reversed on the grounds that the policy set forth in Title VII of the Civil Rights Act of 1964 modified the doctrine of exclusivity embodied in the LMRA. Thus, the Court read Title VII as giving racial minorities special rights, transcending the usual exclusive representation rights of the majority representative.

On remand the Court of Appeals would have the Board consider two questions as determinative of whether the employees' activities were protected by the LMRA: (a) ". . . whether the union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" and (b) whether the conduct of the employees was so "disloyal" as to justify the discharges.

ARGUMENT

I. INTRODUCTION: BASIC OBJECTION TO DECISION

We agree completely with the statements and arguments made by the Board in its Petition for Certiorari and for that reason will not repeat them here but will summarize our position on the principal points argued by the Board by saying as follows:

It is true that Title VII forbids discrimination and also true that it forbids discharging an employee who is seeking to receive its protection.

But this cannot be interpreted to require a partial repeal of Section 9 of the Labor Management Relations Act by saying that the representative chosen by the majority of employees shall be the exclusive representative of all the employees in the unit *except* where minority employees are protesting discrimination and the union is not proceeding in the most expedient and efficacious manner.

Such interpretation is unjustified. If concerted activities were the only way open to combat discrimination there might be a basis for the decision. But Section 9 in no way prevents minority employees from combatting discrimination through the remedies provided by statute. Therefore, there is no need to "reconcile" the two statutes or to suspend the specific language of one statute because of the broad declarations of policy in the other.

II. THE DECISION OF THE COURT BELOW DEMANDS THAT THE EMPLOYER APPLY A STANDARD IN DETERMINING HOW TO DEAL WITH DISSIDENT MINORITY EMPLOYEES THAT IS IMPOSSIBLE TO APPLY IN PRACTICE.

The Board argues that the decision by the Court of Appeals requires it to apply a standard that would

be virtually impossible to administer. That standard is as follows: ". . . whether the union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means." (Pet. App. 28) The Board notes that it would be required to substitute its judgment for that of the union, and that extremely sensitive and delicate considerations of grievance processing are involved which are simply not susceptible to evaluation under the Court of Appeals' standard.

What is true for the Board is doubly true for employers. When an employer is confronted by a minority picket line and other coercive activities, it must endure the economic coercion or bargain with the minority group, unless it determines that the union is meeting that high standard. Unlike the Board, which is a judicial body, the employer has no machinery or conceivable way of determining whether the union is proceeding in the best possible way. And, unlike the Board, it must make its determination immediately and not after extended litigation and consideration.

The unreasonableness of such rule is demonstrated by the following:

First, the employer has no right to inquire into the internal workings of the union in adjusting the conflicting demands among the groups or individuals that the union may represent. Second, the employer is essentially in an adversary position with the union and cannot substitute its judgment for that of the union nor expect cooperation from the union in evaluating union conduct. Third, the employer has a statutory duty to bargain with the properly established bargaining representative, and to bargain with no other. Any inquiry into, or decision by the employer as to whether the union met the Court's "most expedient and efficacious means" standard would be suspect and potentially in conflict with the employer's statutory duty to bargain exclusively with the established representative.

III. THE DECISION OF THE COURT BELOW REQUIRES THE EMPLOYER TO BARGAIN WITH DISSIDENT MINORITY EMPLOYEE GROUPS AND INDIVIDUALS, ALTHOUGH NO MACHINERY EXISTS FOR DETERMINING THE APPROPRIATE BARGAINING UNIT OR FOR DESIGNATING BARGAINING REPRESENTATIVES.

The Board's petition for certiorari pointed out that "[t]he court below did not disturb the Board's finding that the concerted activities here involved 'nothing short of a *demand that* [*the Company*] *bargain with the picketing employees* for the *entire group of minority employees.*'" (Pet. 73-830, p. 14.) (Emphasis added.)

The Court below held that the picketing was protected if the union did not do its job in the most expedient and efficacious manner.

Since the object of the picketing was to compel the employer to bargain, the corollary to this is that under the decision the employer was required to bargain with the picketing employees.

The problems arising out of such decision are set forth briefly below.

First, there is no machinery for determining the appropriate bargaining unit. From their statements it appears that Hawkins and Hollins wanted to represent only minority employees but they wanted to represent all of them: Black, Yellow, Red and Brown.

Hawkins testified as follows:

> "Q. Were you asking the union to appear before the San Francisco Council on behalf of all Brown, Red, Yellow, people?
>
> "A. *We* were trying to represent them." (Transcript before Trial Examiner, p. 55; App. 33.) (Emphasis added.)

See also Transcript before Trial Examiner, p. 37, App. 22. What if two Yellow or two Brown employees also demanded that the employer deal with them on behalf of all minority employees? Suppose that they wanted to represent only their own race or color? How could the employer possibly decide which unit of employees should be used as the basis of bargaining?

If the employer were to take the position that the storewide unit was the established and only appropriate unit but the minority representatives disclaimed any interest in representing anyone other than minority employees or anyone other than their own color, the law provides no machinery for determining the appropriate unit so that the employer could engage in bargaining with any degree of certainty.

Second, there is no machinery for designating the bargaining representative in such cases. The Trial Examiner said:

> "What we have here is a group of four employees who set out on their own to rectify what they in good faith considered working conditions unfair to minority employees. Apparently, *they were self-appointed* for there is *no evidence that they were elected or in any way designated* by minority employees generally to represent them, they alone walked out of the September 3 meeting and it does not appear that they were joined in their picketing activities by other Emporium employees." (Pet. App. 101-102.) (Emphasis added.)

On these facts how can the employer possibly determine who, if anyone, other than the union, has authority to bargain for the minority employees?

We can hardly believe that the decision below requires the employer to bargain simultaneously with any and all minority employees or groups of minority employees who wish to correct alleged discrimination.

Yet the decision below declares that the picketing was protected and therefore that the employer must bargain with someone, without saying who that someone should be.

The absence of any statutory remedy for determining the appropriate unit or ascertaining what representatives have been chosen to represent the employees in such unit is clear proof that the statute was never intended to be interpreted and applied in this way.

IV. THE DECISION OF THE COURT BELOW UNDERMINES ESTABLISHED GRIEVANCE PROCEDURES AS A MEANS OF ELIMINATING DISCRIMINATION.

The Court below said:

> "We cannot agree that any inconvenience which the Company might experience *in being required to bargain with the minority here while still participating in the grievance procedures* justifies withdrawing Section 7 protection from these concerted activities." (Pet. App. 29.) (Emphasis added.)

This declaration requires the employer to proceed on two fronts simultaneously; that is: to bargain with the minority and to litigate with the union respecting the same subject matter. Entirely different rules govern these two types of proceedings and they will inevitably have entirely different results.

No provision whatever is made for the contingency that the Arbitrator might decide wholly or partially in favor of the employer and declare that the grievants have failed to prove in whole or in part that the employer was guilty of any discrimination.

Moreover, the statement above quoted ignores the fact, as found by the Court, that: "[i]n abandoning the grievance procedures and *seeking to bargain on their own,* the picketers have rendered *essentially ineffective* the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 24.) (Emphasis added.)

These results are so greatly at variance with established representation and bargaining procedures as to demonstrate that the decision is contrary to law.

V. THE DECISION OF THE COURT BELOW IS BASED ON AN ERRONEOUS ASSUMPTION THAT THE UNION WAS FREE TO BARGAIN ON THE SUBJECT OF DISCRIMINATION DURING THE TERM OF THE GOVERNING COLLECTIVE BARGAINING CONTRACT.

The Court below ignored the fact that the demand for bargaining took place in the middle of a contract year. (GC-2, Section 38A, App. 103.) In fact it suggested that the union might bargain rather than pursue the grievance procedures specified in the contract, saying as follows:

> "For example, the union might be vigorously processing individual grievances before an adjustment board, *while it would be more efficient and thus preferable for it to be attempting to engage in collective bargaining negotiations with the employer* for all minorities to eliminate all the discriminatory employment practices." (Pet. App. 28.) (Emphasis added.)

This undermines if it does not destroy the stability of a labor contract.

This statement by the Court did not apply to bargaining on a subject not covered by a contract. The subject of discrimination had already been considered in collective bargaining and resulted in a contract provision forbidding discrimination. (GC-2, Section 21E; App. 101.) If there were any violations of this

agreement the parties agreed that these should be handled through the grievance and arbitration machinery set up in the contract. (GC-2, Section 5B, App. 100-101.) Hollins and Hawkins were bound by this agreement as were all other members of the bargaining unit.

The Court below gave no explanation whatever as to how either the union or Hawkins and Hollins could compel the employer to bargain a second time on a subject already agreed upon and included in a contract, particularly in view of the fact that the contract had a so-called "zipper clause" reading:

> "The parties hereto agree that all issues between them are settled by this agreement for the full term thereof excepting those reopenable issues hereinabove specified [wages, vision care benefits and pension benefits]." (GC-2, Section 38C, App. 103.)

Nothing in Title VII requires or justifies such a result. The decision makes both the contract and the "zipper clause" meaningless not just in those situations involving actual discrimination but wherever any minority employee happens to believe that there has been discrimination.

VI. THE CONDUCT OF THE DISSENTING MINORITY EMPLOYEES WAS NOT PROTECTED IN THAT IT CONSTITUTED COERCION OF THE EMPLOYER IN THE DESIGNATION OF THE EMPLOYER'S BARGAINING REPRESENTATIVE.

Hawkins and Hollins picketed the employer to compel the employer to bargain with them but, as Hollins declared at the Adjustment Board, they "wanted to talk to the President of the Emporium and wouldn't talk to anybody else." (Pet. App. 7.) And they refused to talk to the company's personnel director when requested to do so by the company president. (Pet. App. 8.)

Section 8(b)(1) of the Labor Management Relations Act makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his collective bargaining representative.

Section 2(5) of the Labor Management Relations Act reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or *employee representation committee* or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Emphasis added).

We think that Hawkins and Hollins were a labor organization as defined in the Act.

If so, their conduct was an unfair labor practice and cannot constitute protected activity.

If Hawkins and Hollins were not a labor organization we have the bewildering result that the employer is legally compelled to engage in collective bargaining with employee representatives who are not a labor organization and have no recognized status under the Labor Management Relations Act.

Nothing in Title VII requires or justifies such result.

VII. THE DECISION OF THE COURT BELOW WILL REQUIRE THE EMPLOYER TO MAKE CONTRACTUAL PROMISES TO DISSENTING MINORITY EMPLOYEES INCONSISTENT WITH THE EMPLOYER'S OBLIGATIONS UNDER THE GOVERNING UNION CONTRACT.

If the employer is legally obligated to bargain with minority employees it follows that when an agreement is reached the agreement should be reduced to writing and signed.

As the dissenting opinion below pointed out, whatever agreement proves to the advantage of the minority groups inevitably is to some extent to the disadvantage of the majority. Thus we may have two contracts in conflict with each other.

It was found that the record contains no evidence of any discrimination by the employer. In fact the General Counsel disavowed any intent of proving actual discrimination by the employer. (Pet. App. 90-91.)

In bargaining the victory often goes to the side which is stronger rather than the side which is right.

In order to avoid loss from picketing by minority employees who mistakenly but in good faith believe him guilty of discrimination, an innocent employer may actually settle with them by engaging in a reverse form of discrimination favoring minorities at the expense of the majority.

A valid contract cannot be scrapped simply because a couple of minority employees believe in good faith that the employer is guilty of discrimination. Consequently, a contract negotiated with self-appointed minority representatives cannot supersede a contract between the employer and the representative of the employees designated as provided in Section 9 of the Labor Management Relations Act.

On the contrary it must give way where it is in conflict, and therefore the bargaining with the minority becomes meaningless.

If on the other hand the employer has concluded that the minority demands were unlawful and that he could not lawfully agree to them, the law gives him no plain, speedy or adequate protection. It would take nearly a year to secure a Board decision that the minority employees were guilty of a refusal to bargain. The Board is not authorized to enjoin the picketing and boycotting pending a Board hearing.

The manifest injustice of this result is plain proof that Title VII never intended it.

CONCLUSION

In addition to the basic argument advanced by the Board, we have pointed out some of the incongruities resulting from the decision below.

There is nothing in Title VII justifying the conclusion that the general policies in that statute were intended to repeal the specific provisions of Section 9 of the Labor Management Relations Act and thereby produce results as unjust and undesirable as outlined above.

We believe that the opinions of the Seventh Circuit in *Moore v. Sunbeam Corporation,* 459 F.2d 811 (1972), and of the Ninth Circuit in *N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (1964) and 419 F.2d 216 (1969), are correct and should be followed and that the decision below should be reversed.

Respectfully submitted,

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May, 1974.

IN THE

Supreme Court of the United States

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Supreme Court, U. S.
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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent,

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS WESTERN ADDITION COMMUNITY ORGANIZATION, et al.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that minority employees' peaceful leafletting activity

opposing employment discrimination is entitled to protection under the National Labor Relations Act even though the employer is party to a collective bargaining agreement.

STATEMENT OF THE CASE

A. Statement of the Facts

On November 11, 1968, Tom Hawkins and Jim Hollins, two black employees of a department store, were discharged because they twice had distributed leaflets protesting racial discrimination by their employer (Pet. App., p. 10).[1] Each had been employed as a stock clerk by The Emporium, a large chain of department stores in the San Francisco, California area, Hawkins since June 1966, Hollins since November, 1967, at the company's downtown store. Stock clerks at that store were represented for collective bargaining purposes by the Department Store Employers Union ("Union") (Pet. App., p. 3). Both men were members of respondent Western Addition Community Organization ("W.A.C.O."), a predominantly black civil rights group in San Francisco.

By early spring of 1968, Hawkins, Hollins and a number of other minority employees at The Emporium had become acutely aware of the company's employment discrimination against minorities and determined to try to eliminate it (Pet. App., p. 4). Their initial step was to bring the problem to their

[1]"Pet. App." refers to the appendix to the petition in No. 73-696. "A." refers to the separate appendix filed in this Court. All dates referred to in this Brief are in 1968 unless otherwise noted.

Union's attention in order to secure the Union's assistance (Pet. App., pp. 3-4). Thus, on April 3, about 15 minority employees met with Union agents, described specific instances of employment discrimination at The Emporium and asked for appropriate Union action. *Ibid.* As the Union's chief executive officer, Walter Johnson, later testified, "it was the general concensus of the opinion that of those present that there were less opportunities for those who were in the minority race, not only Negroes, but we had Filipinos and all different groups represented" (Pet. App., p. 4; A. 73).

After at least one other meeting of minority employees and Union officials,[2] the Union drafted, approved and sent to The Emporium (and to the company's multi-employer bargaining representative, the San Francisco Retailers' Council), a report which constituted "the official position of the Union that there was racial discrimination at The Emporium" (Pet. App., p. 4). The report, dated April 11, described the meetings which the Union had held with its minority members working at The Emporium, mentioned several unrelated problems at the store, and then stated, "Probably the most important matter raised was the possibility of racial discrimination" (A. 111). The

[2]There is some confusion in the record as to the number and dates of meetings which were conducted before the Union's report was sent. The report itself mentions two meetings (A. 108) and then refers to "additional meetings" (A. 113). Hawkins testified that he "made a grievance" (A. 22) and then attended a Union meeting on April 4. *Ibid.* Hollins testified to a meeting with Union agents in a cafeteria (A. 57-58). The chief Union agent recalled a meeting on April 3 (A. 73), a second meeting shortly after (*Ibid.*), and a third in May (A. 74).

report explained "that most of the minority people were disgusted . . . . They feel that they are entitled to more than a job; that they should have the same opportunity to advance as other employees do" (A. 112). The report also recounted in some detail the instances in which minority employees had been deprived of an opportunity to advance to higher positions. *Ibid.*[3]

Unfortunately, the Union report failed to produce results of any kind to eradicate the racial discrimination at The Emporium (A. 22).[4] Accordingly, in September, the minority employees convened still another meeting, this time at the Union hall, and brought with them their own representatives: an official from the California Fair Employment Practices Commission ("F.E.P.C.") and an advisor from the Economic Opportunity Council of San Francisco ("E.O.C."),[5] the city's anti-poverty program (Pet. App., p. 5; A. 26, 58, 74, 83). Hawkins explained that he requested the E.O.C. advisor to assist them at the September 3 meeting because "being a black man he would know the problem of when you say discrimination" (A. 26).

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[3]Joint Exhibit 1A, The Emporium's Employer Information Report, Form 330-1, documents the pattern of minority employment for this period (A. 120). The EEO-1, prepared for submission to the U.S. Equal Employment Opportunity Commission on April 24, 1968 (A. 89), shows the positioning of minorities to which the Union's April 11 report refers.

[4]While Union agent Johnson testified that a meeting was held with the Retailers' Council (A. 78), it does not appear that the minority employees attended, or even knew about, the meeting.

[5]Not to be confused with the United States Equal Employment Opportunity Commission.

This meeting, like those held five months earlier, was devoted to a discussion of the problem of racial discrimination at The Emporium (Pet. App., p. 5; A. 59). Again, the Union stated that it wished to do something to remedy the discrimination; however, the Union chose to implement the collective bargaining contract's dispute procedures,[6] and it proposed to do so by presenting a series of individual grievances for separate consideration and resolution (Pet. App. p. 5).

Since this proposal to treat grievances individually would not eliminate the systemic racial discrimination practiced at The Emporium, it was found totally unacceptable by the minorities (Pet. App., p. 6; A. 27). As Hawkins testified, "we felt that like if we talked as individuals well, they could only have a few cases, they would satisfy a few" (Pet. App., p. 7, n.12; A. 27). Thus, in addition to feeling that "the Union was sort of putting us off and on and was going into a lot of delay that we felt was unnecessary" (A. 26), the minority employees had fundamental disagreement with the Union's inability to deal with the racial discrimination as a "group matter" (Pet. App., p. 7; A. 27). Hollins testified, "there was a lot of brown, yellow and black people and red

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[6]The collective bargaining contract contained a non-discrimination provision, §21, a ban on strikes and lockouts, §36A, and a procedure for consideration of "all complaints and disputes arising from the terms of this agreement," §36B (A. 101-103). The procedures involved, first, submission to an adjustment board with three members from the Retailers' Council and three from the Union, and, secondly, if the matter remained unresolved, permission to resort to arbitration, §36B-F. *Ibid.*

people that had a lot of grievances on conditions" (A. 27). Accordingly, they requested the Union to seek redress of the broad question of all phases of discriminatory treatment of all minority employees (Pet. App. p. 26; A. 32-33). The Union, nonetheless, refused to proceed on a "group" basis, and the day after this employees' meeting, the Union, on September 4, formally requested a meeting of the adjustment board to consider its pending "individual" complaint (Pet. App., p. 26; A. 119).[7] Six weeks later, on October 16, the board finally convened (A. 33).[8]

Despite their disagreement with the Union's insistence upon representing only individual instances of discrimination, at least eight minority employees attended the adjustment board meeting (A. 75). When it became clear that the Union would persist in presenting individual grievances separately (A. 60), Hollins said "that we didn't want to have our cases taken

[7]The lower court's opinion sets out part of the Union's letter requesting the adjustment board meeting (Pet. App., p. 6). However, an earlier portion of that letter characterizes the subject grievances as "matters concerning our members employed in the stock and marking areas" (Pet. App., p. 83), the department in which both Hollins and Hawkins worked. Thus, the Union intended to confine the scope of the adjustment board grievances to employees in only one department in one store in The Emporium chain and viewed the employees' complaints as individual, not class, grievances.

This severely limited scope, as proposed by the Union, is all the more anomalous in light of the Union's statement in its September 4 letter to The Emporium that "we have approximately 120 pages of testimony, recorded by a court reporter, to substantiate" the allegations of racial discrimination (A. 119).

[8]There were two meetings of the adjustment board, on October 16 and 18 (A. 33-34), and the record is unclear as to which statements were made at which meeting.

as an individual thing . . . . [W]e all wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store" (Pet. App., p. 7, n.12; A. 67). He told the adjustment board members "that we didn't want to stay for the meeting that we didn't feel like the meeting was really representing us because they wanted to take our case as an individual thing and we were fighting it as a whole, not an individual case" (Pet. App., p. 7; A. 60). Subsequently, four minority employees—Hawkins, Hollins, Ron Epps and Carlton Washington—left the meeting (Pet. App., p. 8; A. 60).

At about this same time, mid-October, Hollins attempted to talk directly with Mr. Batchelder, president of The Emporium, about the racial discrimination at the store (Pet. App., p. 8).

> I just went up and I told him, Mr. Batchelder, that is, I said, "I want to talk about a situation that I felt should be discussed about things that were happening among minority employees at the store." He said that he didn't want to talk. He told me that Mr. Henderson took care of problems like that (A. 65).

In fact, Hollins previously had spoken with Henderson, company personnel director, about discrimination at The Emporium; the conversation had been totally unproductive (Pet. App., p. 8; A. 64-65).

Six months having passed with no progress toward the elimination of the discrimination, Hawkins, Hollins, Washington and Epps held a press conference

on October 22, at the Sun-Reporter Building in San Francisco (Pet. App., p. 8; A. 9). The black employees read a statement, substantially similar to the leaflet they would later distribute (see *infra*) and told the media reporters about The Emporium's racially discriminatory policies. They said that they were attempting to talk to "the top management" to get better conditions for minorities, and that they were "possibly going to hold a boycott of The Emporium" (Pet. App., p. 8; A. 10-11, 37).

On Saturday, November 2, the four black employees distributed leaflets at the entrances to The Emporium (Pet. App., p. 9).[9] As Union chief Johnson testified, "At particular times throughout the summer, they wanted something dramatic" (A. 81). In fact, at the September 3 Union meeting, after months of

[9]The leaflets contained the following message (Pet. App., p. 9; A. 105):

BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!

For years at the Emporium black, brown, yellow and red people, have worked at the lowest jobs, at the lowest levels. Time and time again we have seen intelligent hard working brothers and sisters denied promotions and basic respect.

The Emporium is a 20th Century colonial plantation. The brothers and sisters are being treated the same way as our brothers are being treated in the slave mines of South Africa.

Whenever the racist pig at The Emporium injures or harms a black sister or brother, they injure and insult all black people. The Emporium must pay for these insults. Therefore, we encourage all of our people to take their money out of this racist store, until black people have full employment and are promoted justly throughout The Emporium.

We welcome the support of our brothers and sisters from the churches, unions, sororities, fraternities, social clubs, Afro-American Institute, Black Panther Party, W.A.C.O. and the Poor People's Institute.

inattention to their rather massive complaints[10] of racial discrimination, "there were some frustrations exhibited about the situation" (Pet. App., p. 6; A. 81). Thus, there was a conversation at that meeting between Johnson and Hawkins, with the other minority employees present, during which the suggestion was made that the Union and the Union members picket The Emporium. *Ibid.* In response, Johnson said the Union—because of its contract—could not do so. But, as he testified at the hearing, he did not "at any time . . . warn or instruct the employees not to engage in any activity on their own." *Ibid.* To the contrary, "we informed them that we had a contract, we couldn't participate in any boycotting activities, [but] that individuals could take whatever action they wanted to as long as it was legal." *Ibid.* On cross-examination, Johnson was specifically asked:

> Q. When you say that these things were pointed out, did you specifically tell the employees who were present that they could take whatever action they wanted to?
>
> A. Yes. I said that an individual has the right to take action, but a Union could not (A. 81).

Even more pointedly, advisor Scott from the Economic Opportunity Council of San Francisco told the employees that the situation already "was beyond the picketing stage" (A. 82). And, while Johnson encouraged the minorities to follow the Union's arbitration

[10]Johnson estimated that about 40 Emporium employees had attended the April Union meeting (A. 77). Union agent Griffin testified that virtually every employee who came to the September meeting related "some sort of discrimination going on in The Emporium" (A. 85).

procedure and said that he would not participate in any "drama," he expressly advised the minority employees that "if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals" (Pet. App., p. 6; A. 83).[11]

The leaflet distribution was conducted peacefully, quietly,[12] without blocking or disturbing shoppers, without criticism of the store's merchandise or services, from 9:30 a.m. to 6:00 p.m. on Saturday, an off-duty day for the employees (Pet. App., p. 9; A. 12-14, 45-47). The following Thursday, November 7, Hawkins and Hollins were summoned separately to the office of the company's personnel director, told not to distribute leaflets again, advised that they could be fired if they did, and handed warning notices[13]

[11]The Union's account of its advice—that, as individuals, Hollins and Hawkins were at liberty to undertake individual action in support of their objective—wholly supports respondents' description of these facts. See Statement of Facts in Amicus Curiae Brief of Department Store Employees Union, Local 1100, pp. ..... (August, 1974).

[12]Hawkins admitted that he did raise his voice in response to people who called him "nigger", "Communist" and other "fictitious names" because he did not want to destroy his self-respect (A. 13-14). Similarly, Hollins raised his voice once when a lady asked him why he didn't go back to Africa (A. 47).

[13]Hollins warning stated:

> On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as those set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and Station KDIA.
>
> On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.
>
> These statements are untrue and are intended to and will, if continued, injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.
>
> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement (Pet. App., p. 10, n. 17).

Hawkins' warning did not contain the first paragraph but was otherwise identical (A. 106).

(Pet. App., p. 10; A. 14-15, 45-50). Nevertheless, that Saturday, November 9, Hawkins, Hollins, and a few other minority employees distributed virtually identical leaflets, at the same places, during the same hours, in the same manner as the week before (A. 15-17, 50-51). During the leafletting, Johnson spoke to Hollins and repeated the suggestion that contract grievance procedures be pursued (Pet. App. 9-10). He cautioned that Hollins and Hawkins might be jeopardizing their jobs and expressed the concern that "I didn't want to see them get fired" (*Ibid.;* A. 76).

On Monday, November 11, Hollins and Hawkins were summoned again to the company's personnel office, and each was given a notice of termination stating "You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9, 1968 in front of The Emporium, 835 Market Street, S.F. pursuant to written warning dated 11/7/68 for similar action on 11/2/68" (Pet. App., p. 10; A. 17-18, 51-52). Johnson, acting on behalf of the Union, immediately filed a grievance with the Retailers' Council protesting Hawkins' and Hollins' discharges (Pet. App., p. 10; A. 76).

B. Proceedings Before the N.L.R.B.

On November 19, W.A.C.O. filed an unfair labor practices charge (A. 93) with the National Labor

Relations Board ("N.L.R.B."), alleging that The Emporium's discharge of Hawkins and Hollins violated Section 8(a)(1) of the National Labor Relations Act ("Act"), as amended, 29 U.S.C. §§151, *et seq.* (Pet. App., p. 11). Complaint issued on March 4, 1969 (A. 94-96), and a hearing was conducted on April 8, 1969 (Pet. App., p. 11).

The Board's Trial Examiner, in his decision dated October 20, 1969 (Pet. App., p. 78-106), found—and all parties agree—that Hawkins' and Hollins' protest was grounded in a good faith belief that employment discrimination existed at The Emporium (Pet. App., pp. 11, 96).[14] He also found the employees' activities to be "concerted" under the Act, but undeserving of statutory protection because they were "inconsistent with and disruptive of" the union-management relationship and contract (Pet. App., p. 94). Accordingly, he recommended that the complaint be dismissed (Pet. App., p. 106).

A three-member majority of the Board summarily adopted the Trial Examiner's findings, conclusions and recommendation to dismiss the complaint (Pet. App., pp. 54-55). Two Board members, Jenkins and Brown, filed extensive and strenuous dissents (Pet. App., pp. 56-77).

Board member Brown focused his dissent upon—and rejected—the Trial Examiner's finding that Haw-

[14]The issue of discrimination in fact was not proved because the case was tried by the N.L.R.B.'s General Counsel on the theory that only a good faith belief that discrimination existed was necessary to establish protection under the Act for Hawkins' and Hollins' activities (Pet. App., p. 91).

kins and Hollins, in fact, had demanded that the company bargain with them "for the entire group of minority employees on terms and conditions of employment" (Pet. App., p. 75).

> There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an agreement . . . (Pet. App., p. 76-77).

Instead, Brown viewed the employees' purpose to be no more than submission of a grievance concerning racial discrimination, a condition which the company was bound by law to correct. *Ibid.* He concluded that Section 9(a) of the Act plainly encompassed the employees' purpose, that their actions did not undermine or derogate rights of collective bargaining and that there was no justification for Hawkins' and Hollins' discharges (Pet. App., pp. 76-77).

Board member Jenkins agreed that the discharged employees' purpose had been simply to present a grievance and was therefore protected within the Section 9(a) proviso (Pet. App., p. 58, n.4).[15] But the principal thrust of Jenkins' dissent was directed to the Trial Examiner's finding that the minority

[15]Nor did Jenkins accept the Trial Examiner's finding that the Union had endeavored "in every way available to it under the agreement to adjust any and all cases of racial discrimination . . . ." To the contrary, the Union's delay and inactivity contributed to Hawkins' and Hollins' determination to protest as they did (Pet. App., p. 69, n.7).

employees' activities had been in derogation of the Union's status, had undermined the concept of exclusivity and had improperly burdened the company (Pet. App., pp. 57-58). Jenkins rejected the possibility that concerted protest against employment discrimination loses the Act's protection simply because the union and management have included a non-discrimination clause in their contract. Nor, he wrote, does a union fully discharge its duty to eradicate discrimination simply by taking a position against "some" discrimination:

> If a union position in favor of the elimination of *some* but not all racial discrimination can foreclose concerted employee activity to remove *all* racial discrimination, collective bargaining on this subject is converted from a shield protecting employees against racial discrimination into a sword by which such protection can be cut down or cut back (Pet. App., pp. 65-66) (emphasis in original).

C. The Court of Appeals' Decision

The U.S. Court of Appeals for the District of Columbia Circuit concluded "that the Board's decision that these concerted activities were not protected by the Act is not supported by substantial evidence in the record and must be reversed" (Pet. App., p. 18).[16]

[16]The case was remanded solely for the Board's consideration of the disloyalty issue (Pet. App., pp. 19, 29-31) which neither the Board nor Trial Examiner had decided (Pet. App., pp. 11, 29-30, 97-101). In fact, as Senior District Judge Wyzanski concluded, the disloyalty issue was not properly preserved in view of the Board's failure to ground its action upon possible disloyalty. Accordingly, he did not join in the remand but would simply have ordered the Board to grant the relief sought by the complaint (Pet. App., pp. 51-53).

The court's analysis began with the proposition that the right of an employee to be free from racially discriminatory treatment emanates from the overriding "national labor policy which unequivocally rejects racial discrimination in employment" (Pet. App., p. 13). Section 7 of the Act not only encompasses this paramount right, the court recognized, but accords it a substantially higher priority than other Section 7 rights (*Id.* at 19, 22). The need to recognize this priority is reinforced by Section 704(a) of Title VII which "precludes an employer from discharging employees in retaliation for peaceful picketing of the employer's business in protest of allegedly discriminatory racial practices" (*Id.* at 20).

With these considerations in mind, the court found the employees' concerted activities to have caused only slight, if any, interference with Section 9(a) principles: first, because the Union could not lawfully tolerate even "some" discrimination; secondly, because Hawkins and Hollins had first sought to utilize the collective bargaining process;[17] and finally, because the minority employees and the Union, in fact, had not been working at cross-purposes (*Id.* at 22-26).[18]

The court concluded that, in cases involving racial discrimination, unless the Union "was actually remedying the discrimination to the *fullest extent possi-*

[17]The court thus attempted to preserve for the grievance-arbitration procedures "an important role in remedying racial discrimination in employment" (Pet. App., p. 25).

[18]The "wildcat" strike cases were thus distinguished by the court. (Pet. App., pp. 16-18, 26).

ble by the most expedient and efficacious means," the Union's methods or intentions cannot serve to restrict minority employees or to take away their Section 7 protection (*Id.* at 28) (emphasis in original). Any other result would permit an employer to use Section 9(a) as a shield to avoid its duty to eliminate racial discrimination (*Id.* at 29).[19]

SUMMARY OF ARGUMENT

This case presents for review the Court of Appeals' decision reconciling and accommodating two different statutes, enacted at different times in response to different problems, but both designed to effectuate a single federal labor policy. The National Labor Relations Act prohibits discrimination against employees based upon their exercise of the right of self-organization, including self-organization for the purpose of opposing racial discrimination in employment. Title VII of the 1964 Civil Rights Act addresses itself more comprehensively to the problem of racial discrimination. Still, both statutes are but different statements of a cohesive national policy.

Thus, the court below realized that, even though this case involves an issue raised under the Labor Act, that Act should not be viewed in isolation. Any

[19]Judge Wyzanski filed a separate opinion in which he rejected the majority's use of a balancing test to accommodate the principles of Section 7 and Title VII, on the one hand, and Section 9(a), on the other. Instead, he would find that Section 9(a) exclusivity was never intended to curtail minority employees' efforts to eliminate racial discrimination. Thus, based upon legislative history, statutory and constitutional law, and policy, he believed Section 9(a) simply inapplicable (Pet. App. pp. 41-51).

other approach fails to recognize, first, the strong thrust of the national labor policy unequivocally to reject racial discrimination in employment and, secondly, the Board's clear obligation to administer the Labor Act within the framework of this broader national policy. Having adopted this perspective, the court was able to apply the proper principles to the facts of this case in a manner that balances and amply accommodates the objectives of the two statutes.

Whenever a court adopts a balancing test, it is possible to discern risks and evoke speculations. The facts of this case, however, do not readily lend themselves to such treatment. Tom Hawkins and Jim Hollins, two young, black stock clerks, were discharged by The Emporium because they had distributed leaflets protesting the store's racially discriminatory employment practices. They had good reason to believe there was discrimination: they personally had suffered from it; their fellow minority employees had confirmed it, and their Union had announced as its official position that the company engaged in discriminatory practices.

Hawkins and Hollins first turned to their Union for appropriate action but, after seven months, it was clear that the Union, for whatever reason, would not furnish a realistic remedy to their problem. The employees' direct approaches to management were rebuffed as well. Refusing to abandon their goal of equal employment opportunity, however, Hawkins and Hollins took independent action and, consequently, were discharged.

Federal labor policy generally favors, and Section 704(a) of Title VII expressly protects, the employees' protest in opposition to employment discrimination. Their protest consisted simply of distributing leaflets, peacefully, lawfully, and on their own time to passers-by whose entrance to The Emporium was in no way hindered. The Union had been asked, but declined, to participate in the leafletting, although Hawkins and Hollins were advised that they, as individuals, were free to engage in any such lawful activity. As the Union's *amicus curiae* brief makes clear, the Union in so advising the employees recognized that—contrary to the petitioners' contentions—the two minority employees were not seeking to establish separate collective bargaining for a discrete unit of employees.

The numerous Congressional expressions of the national labor policy against employment discrimination, of which Title VII is the most recent articulation, form the context in which the N.L.R.A. must be administered. In any case, the Act, as construed by the courts and the Board, independently rejects racial discrimination in a variety of circumstances. There would be grave constitutional questions if it did not.

The lower court recognized, of course, that, where there is an exclusive bargaining agent, some employee action is prohibited by Section 9(a) of the Act. That section reflects the labor doctrine that unions can best serve their employees and that union-management stability can best be assured when employee factions are not permitted to bargain against each

other and when employers are not free to divide and conquer their employees.

Hawkins' and Hollins' conduct did not contravene Section 9(a). They were discharged because they leafletted; they leafletted because racial discrimination at The Emporium persisted, despite their earnest efforts to engage both union and management in its elimination. The two employees had waited for seven months for their union to act; they had attempted to utilize the union-management grievance mechanism. When, eventually, they abandoned the Union, they did so to compel their employer to cease discrimination where they worked. Section 9(a) principles are not applicable to these facts.

Whether the employees' objective be deemed a demand for parity—that minorities as well as whites might enjoy equal employment opportunity—or simply as the presentation of a grievance, it is at least certain that they did not seek collective bargaining for the purpose of negotiating an agreement establishing terms and conditions of employment for a unit of employees. They did not seek to compete with or undercut the Union. Certainly the Union, which continues to support the employees before this Court, did not feel threatened. Nor can the employer's slight inconvenience—in being met by employee protest against discrimination—justify the employees' discharges, for, even without their request, the company was lawfully bound to eliminate, unilaterally if necessary, racially discriminatory employment practices. Neither the Union's existence, its exclusive

representation status nor the presence of a non-discrimination clause in the collective bargaining agreement adds anything to the employees' statutory rights to seek the eradication of discrimination. This being so, neither should these factors deprive the employees of their otherwise plainly protected objective and method of protest.

It is now well settled that, where such paramount rights are at stake, the availability of one remedy does not foreclose another. Thus, recourse to the N.L.R.B. is not precluded by the existence of alternatives. Moreover, after *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), it is now equally clear that had the minority employees sought their remedy under Title VII, that Act would have afforded them appropriate protection. To thus deny them relief in this case can only mean that the N.L.R.A. affords them no such protection. Similarly, at least in the area of employment discrimination, the election of remedies doctrine has no applicability, nor should it, in light of the substantial disadvantages of available options. Finally, affirmance of the decision below will serve both to endorse N.L.R.B. involvement in this area, a process which the Board itself recently has accelerated, and, at the same time, to encourage management and union responsiveness to minority claims, thereby promoting industrial stability.

ARGUMENT

Since this case concerns the proper role to be assumed by the National Labor Relations Board in effectuating the federal labor mandate to eliminate racial discrimination in employment, the argument in this brief will first describe the interests to be balanced: the policy to eliminate discrimination, its various Congressional expressions, and the principles of accommodation. Next, this accommodation of interests will be applied to the particular facts in this case. That section of the brief will demonstrate the efficacy of the Court of Appeals' standard for the balancing of those interests, a standard which reflects a careful effort to engage the Board in the elimination of employment discrimination without, at the same time, disregarding other important labor law principles. Finally, this brief will analyze the result of this application in terms of the policy ramifications it promotes.

I. THE NATIONAL LABOR RELATIONS ACT INDEPENDENTLY, AND AS PART OF THE NATIONAL LABOR POLICY, REJECTS UNEQUIVOCALLY RACIAL DISCRIMINATION IN EMPLOYMENT.

As the court below recognized, the National Labor Relations Act independently prohibits racial discrimination in employment. Still, this statutory objective becomes even clearer with recognition of the overall national labor policy—to assure equality of employment opportunity by eliminating discriminatory practices and devices, *e.g., Alexander v. Gardner-Denver Co.,* 94 S.Ct. 1011, 1017 (1974)—and of the Act's proper relationship to that policy.

Congress has consistently indicated that the policy against discrimination be considered of the "highest priority," not only by successive legislation, but also by the determination that such enactments afford "parallel or overlapping remedies against discrimination." *Id.* at 1019.[20] Congressional action in this area has been paralleled, and often elucidated, by the decisions of this court. *E.g., Alexander v. Gardner-Denver Co.,* 94 S.Ct. 1011 (1974); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944);[21] *New Negro Alliance v. Sanitary Grocery Co.,* 303 U.S. 552 (1938); *Truax v. Raich,* 239 U.S. 33, 41 (1915).

The *New Negro Alliance* case demonstrates this Court's determination not only to prohibit racial discrimination in employment, but to protect lawful protest opposing such discrimination. Under circumstances strikingly similar to the case at bar, Negroes in that case sought, and management refused to provide, equal employment opportunity. Orderly picket-

[20] *E.g.,* 42 U.S.C. §1981 (discrimination in private employment); 42 U.S.C. §1983 (discrimination in public employment); Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, *et seq.;* and the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e, *et seq.* (as amended).

[21] The *Steele* decision heralded a long, consistent line of authority to assure fair representation by a union of all those whom it is chosen to serve. Decisions enforcing this duty of fair representation have proliferated, both under the Railway Labor Act, 45 U.S.C. §§151, *et seq.* (*e.g., Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768 (1952); *Glover v. St. Louis-San Francisco Railway Co.,* 393 U.S. 324 (1969)), and under the National Labor Relations Act, 29 U.S.C. §§151, *et seq.* (*e.g., Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953)).

ing ensued, with a placard reading "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" *Id.* at 559. In holding that the Norris-La Guardia Act, 29 U.S.C. §§101, *et seq.,* covered and protected the pickets, this Court stated, in words of great applicability to the present case: "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation." 303 U.S. at 561.

The steady thrust of this Congressional and judicial action has engendered a recognition that the N.L.R.A. itself prohibits racial discrimination in employment. Thus, it is now well settled that a union's breach of the duty of fair representation not only is actionable under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, but also constitutes an unfair labor practice in violation of Section 8(b) of the N.L.R.A., 29 U.S.C. §158(b). *Vaca v. Sipes,* 386 U.S. 171 (1967); *United Packinghouse Workers Union v. N.L.R.B.,* 416 F. 2d 1126 (D.C. Cir.), *cert denied,* 396 U.S. 903 (1969). *Accord, N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (9th Cir. 1965); *Pacific Maritime Assoc.,* 209 N.L.R.B. No. 88 (March 8, 1974); *Washington State Service Employees State Council No. 18,* 188 N.L.R.B. 957 (1971).[22]

[22] The Board has examined racial discrimination in a different context, as well: that of the conduct of representation elections. Thus, the N.L.R.B. has found a violation of the Act where an employer made flagrant appeals to racial prejudice in the course of a union election campaign. *E.g., Sewell Manufacturing Co.,* 138 N.L.R.B. 66 (1962).

Most recently the Board, in a striking departure from past practice, has decided that, where a union which has won a certification election is charged with engaging in invidious discrimination, the Board will conduct an inquiry and, in appropriate cases, deny certification. *Bekins Moving & Storage Co. of Florida, Inc.,* 211 N.L.R.B. No. 7 (June 11, 1974). This stance was adopted, the Board said, in light of the constitutional, as well as statutory, imperative not to tolerate "any forms or practices of discrimination. *Bolling v. Sharpe,* 347 U.S. 497 (1954); *Shelley v. Kraemer,* 334 U.S. 1 (1948)." *Id.* at p. 4 of slip opinion.

Unfortunately, in the instant case, as the Court of Appeals below pointed out, neither the Board nor its Trial Examiner took cognizance of the N.L.R.A.'s own prohibition against racial discrimination in employment (Pet. App., p. 12). Instead, the Trial Examiner (and the Board majority, by its silence) totally disregarded both the compelling sweep of the national policy to eliminate discrimination and the Act's proper relationship to that policy. Thus, the Trial Examiner commented:

> (Parenthetically, it is noted that as adjudicators under the Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.) Pet. App., p. 101.

This parenthesis represents the ultimate expression of excessive fidelity to administration of the Act. But fidelity to the Act, this Court has taught, requires recognition of the broader national policies within

which it is to be administered. This point was forcefully made in *Southern Steamship Co. v. N.L.R.B.,* 316 U.S. 31 (1942), a case heavily relied on by the lower court (Pet. App., p. 21). As this Court stated in *Southern Steamship:*

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. 316 U.S. at 47.[23]

The legislative history strongly supports the lower court's conclusion that Congress intends the N.L.R.B. to give effect to the broad national labor policy, including the elimination of racial discrimination. The lower court's conclusion was recently confirmed by this Court in *Alexander v. Gardner-Denver.*[24] Thus,

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[23] As Board member Jenkins observed in his dissenting opinion in this case, "[t]he Act we administer must be read consistently with other Federal statutes which established the national labor policy. *Textile Workers Union of America, AFL-CIO v. Lincoln Mills,* 353 U.S. 448, 456-458" (Pet. App., p. 71). *Cf., McLean Trucking Co. v. United States,* 321 U.S. 67 (1944): "But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." 321 U.S. at 79-80.

[24] As this Court noted in *Alexander v. Gardner-Denver,* 94 S.Ct. 1011, 1019-1020, n.9:

> For example, Senator Joseph Clark, one of the sponsors of the bill, introduced an interpretive memorandum which stated: "Nothing in Title VII or anywhere else in this bill affects the

the Congress and the courts have insisted that this Act provide an effective remedy for racial discrimination in employment. Such insistence recognizes that racial discrimination prevents the realization of employee rights to engage in "concerted activities" under the Act and, hence, hinders the goals of effective union-management relations and industrial stability.

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rights and obligations under the NLRA or the Railway Labor Act . . . . Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other federal and state statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964). Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. 110 Cong. Rec. 13650-13652 (1964). And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. See H.R. 9247, 92d Cong., 1st Sess. (1971). See also 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. (1972), pp. 2137, 2179, 2181-2182. The report of the Senate Committee responsible for the 1972 Act explained that [neither] the "provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92nd Cong., 1st Sess. (1971). For a detailed discussion of the legislative history of the 1972 Act, see Sape and Hart, Title VII Reconsidered: The Equal Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972).

It is of consequence that, by the time of this second enactment of the Equal Employment Opportunity Act of 1972, decisions had held racial discrimination to violate both Section 8(a) (employer practices) and Section 8(b) (union practices) of the Act. *E.g., United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (§8(a)(1) violation); *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965) (§8(a)(1) violation); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (§8(b)(1)(A) violation). And, of course, fair representation cases under L.M.R.A. Section 301 have issued regularly from the courts since 1944.

II. THE MINORITY EMPLOYEES' CONCERTED ACTIVITY WAS ENTITLED TO N.L.R.A. PROTECTION BECAUSE, AS THE RECORD SHOWS, THEIR CONDUCT CONSTITUTED LAWFUL OPPOSITION TO EMPLOYMENT DISCRIMINATION, NOT A REQUEST FOR RECOGNITION AND COLLECTIVE BARGAINING.

Since the N.L.R.A. independently, and as a part of the cohesive national labor policy, rejects racial discrimination in employment, efforts to eradicate such discrimination also warrant protection of the Act. This is particularly true in light of Title VII's express authorization for protest, as well as other efforts, directed at fulfilling the national labor policy to eliminate such discrimination. Indeed, protest—in a form which was substantially more boisterous and disruptive than the conduct in this case—has been found to be protected by Section 704(a) of Title VII. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Similarly, conduct by employees opposing discrimination has been protected under the N.L.R.A. so long as no union was present[25] or, as was true in this case, union processes were not totally disregarded.[26] Because the record demonstrates that the employees' conduct here did not amount to bargaining, their concerted activities are clearly protected by Section 7 of the Act and are not subject to the limitations of Section 9(a) or Section 8(b)(7)(A).

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[25] *E.g., N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).

[26] See *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969) (no Section 7 protection where employees fail first to seek union assistance to eradicate race discrimination).

A. Section 9(a) Exclusivity Does Not Apply to the Employees' Conduct in This Case.

The exclusivity principle contained in Section 9(a) of the Act intends to insulate unions from the sluicing effect of competing collective bargaining negotiations. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 684 (1944). Exclusivity embodies the concept that employees can best realize their collective bargaining goals if their representative is free to present and negotiate a single set of demands for all employees. Exclusive representation status protects employees by preventing employers from negotiating with splinter groups or individuals. *Id.* at 685 (1944). Thus, the lower court explained, a primary purpose of Section 9(a) "was to prevent the situation where two or more agreements might be negotiated by splinter groups which treated various factions of the bargaining unit unequally" (Pet. App., p. 15). Exclusivity prevents unequal treatment of similarly situated workers.[27]

Attention to the record in this case discloses that Hawkins and Hollins never contemplated nor took action to which Section 9(a) is applicable. The record is uncontradicted on these facts: first, Hawkins and Hollins believed in good faith that there was racial discrimination practiced at The Emporium which

[27]Exclusivity has never implied unfettered power. Rather, the grant of statutory authority to unions exacts the corresponding "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts . . . ." *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. at 203. In short, Section 9(a), like all other provisions of the N.L.R.A., was intended for the benefit of employees, not unions. *See also, J. I. Case Co., v. N.L.R.B.*, 321 U.S. 332, 338 (1944).

severely disadvantaged all minority employees.[28] Secondly, their objective was to remedy that discrimination for all minorities.[29] Finally, having realized

[28]This belief, as the Union's official position verified, was well-grounded The Emporium's EEO-1 report, filed in April, 1968 (A. 120), amply documents this complaint. Thus, there were 1,004 unskilled (laborers and service workers) positions at the company; of these, 285, or 28%, were minority. On the other hand, of 5,175 professional, skilled or semi-skilled positions, only 546 (or 11%) were held by minorities. Only 1 of 47 "white collar" on-the-job trainees was a minority (Negro male). An employees' survey (A. 115-118) further demonstrated that, even in the "selling" positions which were occupied by 10% minority employees, non-whites were restricted to the least remunerative, lowest commission jobs.

This documentation wholly supports the thrust of Hawkins' and Hollins' complaint: that minorities, while hired by the company, were uniformly relegated to low-paying, dead-end jobs, without hope of advancement commensurate with their merit on the job. Evidence like this was offered at the N.L.R.B. hearing not to prove a Title VII case, but merely to establish the employees' *bona fides* in protest (Pet. App., pp. 90-91). Nonetheless, statistical evidence of employment discrimination may establish a Title VII violation, *e.g., Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), or, at the least, make out a *prima facie* case of discrimination, *e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825 (1973); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970) As this Court stated in *McDonnell Douglas, supra*, 93 S.Ct. at 1825:

> Other evidence that may be relevant to [determining the reason for the employee's discharge] includes . . . the petitioner's [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful . . . .

[29]Hawkins and Hollins testified repeatedly of their concern for "brown, yellow, black and red people" (*e.g.*, A. 27) and of their commitment to a solution for all minorities as a group (Pet. App., p. 7). This concern comports with judicial views: "Whether in name or not, the [discrimination] suit is perforce a sort of class action for fellow employees similarly situated." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968). *See also, Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710, 713 (5th Cir. 1973), ("racial discrimination . . . is by definition class discrimination"); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Georgia Power Co. v. E.E.O.C.*, 412 F.2d 462, 468 (5th Cir. 1969).

the futility of depending upon the union for an effective remedy, the two employees tried to talk to company management: "Hollins went to the Company president requesting that 'they talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store'" (Pet. App., p. 8). Only after Hollins' request was rejected did the protest begin.

Moreover, the record establishes that Hawkins and Hollins were fired because of their conduct in protesting racial discrimination. The record shows that their protest was intended to publicize, and thus to induce response to, their underlying grievance concerning discrimination. Viewed as either protest or grievance, however, their conduct warranted protection under the Act. As the Union in its *amicus curiae* brief more fully develops:

> As a matter of uncontested fact, HAWKINS and HOLLINS were not discharged for any effort to bargain with the Company. Rather, they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company. . . . Indeed, with but one exception, the Company was not even aware of any intent to bargain on the part of HAWKINS and HOLLINS when they were fired and nearly all the evidence pertaining to this issue was adduced only at the Board hearing—long after the discharges [footnote omitted].[30]

Once the employees' activity at issue is characterized as protest—orderly distribution of literature relating to concerted interests—constitutional and statutory considerations demand that the employees be accorded the greatest latitude. *E.g., N.L.R.B. v. Magnavox Co. of Tennessee,* 94 S. Ct. 1099 (1974); *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793 (1945); *Gale Products,* 142 N.L.R.B. 1246 (1943). Precisely the same latitude must be provided if, on the other hand, the employees' discharges are considered to be based upon the underlying grievance which their protest was designed to publicize. Under either characterization, the record shows that Hawkins and Hollins sought simply to attain that to which they and their fellow minority employees were entitled: the same terms and conditions of employment which whites received. This, and nothing more. The collective bargaining agreement created contract rights;[31] Hawkins and Hollins attempted to achieve realization of these rights for minorities. In a word, the two employees sought "parity" for those, including themselves, to whom it had been denied.

Section 9(a) exclusivity never was intended to prevent employees from seeking that which, by contract,

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[30] Amicus Curiae Brief of Department Store Employees Union, Local 1100, p. —— (August 1974).

[31] As pointed out in this brief, *infra* in Section III of the Argument, the right to be free from discrimination in employment does not depend upon union-management acceptance of a nondiscrimination clause in the collective bargaining agreement.

was their due. The leading case on this issue, *Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711 (1945), delineates quite precisely the interests which Section 9 (a) safeguards. There, this Court instructed that unions are to be unhindered in "the formation of collective agreements or efforts to secure them." *Id.* at 723. Exclusivity protects unions in their "acquisition of rights for the future." *Ibid.*

Hawkins' and Hollins' Union had negotiated a collective agreement. Its provisions set out the terms and conditions of employment and expressly prohibited discrimination because of race or color. Their Union, however, had been unable to enforce these provisions; their employer had been unwilling. Under these circumstances, the two employees sought not to negotiate new terms of employment, nor to modify pre-existing ones, but simply to achieve what the contract promised them. Section 9(a) premises are simply inapplicable to these facts.[32]

Hawkins' and Hollins' purpose has most accurately been described in the cases distinguishing "bargaining" from a "grievance." Thus, the *Elgin* case describes a grievance as a dispute which "contemplates the existence of a collective agreement already concluded . . . [and] relates either to the meaning or proper application of a particular provision . . . ." 325

[32]The lower court reached this same conclusion on slightly different grounds. The court reasoned that Section 9(a) allows unions to balance and adjust only legitimate conflicting demands. Since the union cannot legitimately tolerate any racial discrimination, the union and minority employees could not be at odds on this point and, therefore, there were no "balances" to be made (Pet. App., pp. 22-23).

U.S. at 723.[33] "[T]he claim is to rights accrued, not merely to have new ones created for the future." *Ibid.*[34]

[33]The legislative history of the 1947 Taft-Hartley Act, amending the N.L.R.A. (when the Section 9(a) proviso was modified to its present form), indicates Congressional codification of the *Elgin* holding in the current proviso. Thus, bill co-author Representative Hartley confirmed Representative Owens' statement that "under this provision we have gone in accord with the decisions of the Supreme Court of the United States, which hold that where employees have a grievance, for instance in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without having a bargaining agent." Cong. Rec., House—April 17, 1947 (Vol. I, Leg. Hist. LMRA of 1947, p. 781).

Co-author Senator Taft also explained:

> An amendment contained in the revised proviso for Section 9(a) clarifies the right of individual employees or groups of employees to present grievances. The Board has not given full effect to this right as defined in the present statute. . . . The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given the opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect. Sen. Rep. No. 105, 80th Cong., 1st Sess. 1126 (1947).

Much of this legislative history is discussed in *Illinois Ruan Transport Corp. v. N.L.R.B.,* 404 F.2d 274, 286, n.3 (8th Cir. 1968).

[34]See also *N.L.R.B. v. North American Aviation Co.,* 136 F.2d 898 (9th Cir. 1943), which construed the Section 9(a) proviso even before it was strengthened. That case involved a Board claim that permitting an employer to have "two grievance procedures" would nullify the effect of the collective bargaining agreement. The court responded, "But it may be that the law makers in blazing a course for collective bargaining also had in mind the preservation of the individual right of protest as well as the benefits that logically flow from an understanding between employer and employee." *Id.* at 899-900. The Seventh Circuit has similarly explained that "a grievance under section 9(a) is not necessarily limited to minor matters, but may entail problems arising under a collective bargaining agreement . . . ." *N.L.R.B. v. Kearney & Trecker Corp.,* 237 F.2d 416, 420 (7th Cir. 1956). *See also Hughes Tool v. N.L.R.B.,* 147 F.2d 69 (5th Cir. 1945); *cf., Black Clawson Co. v. International Ass'n of Mach.,* 313 F.2d 179, 184-186 (2nd Cir. 1962).

The *Elgin* doctrine is reflected in the opinions of the two dissenting Board members. Each of them strenuously criticized the Trial Examiner's conclusion that Hawkins and Hollins had engaged, or attempted to engage, in bargaining within the meaning of Section 9(a). "There is nothing in the evidence," Member Brown noted, to indicate a "purpose to 'negotiate'"; rather, the employees sought to convince the company's president to correct the alleged discriminatory treatment of minority employees as express provisions of the bargaining agreement required (Pet. App., p. 75).

Brown thus viewed the employees' purpose to be simply the presentation of a grievance concerning racial discrimination, a condition which the company, in any case, was bound by law to correct. *Id.* at 76. Board Member Jenkins similarly agreed that the discharged employees' purpose had been merely to present a grievance and was therefore protected within the Section 9(a) proviso (Pet. App., p. 58, n.4).[35]

B. Section 8(b)(7)(A) of the Act Does Not Apply to the Employees' Conduct In This Case.

The government's brief to this Court raises—for the first time at any stage of the litigation—the novel theory that Section 8(b)(7)(A) of the Act may somehow proscribe the minority employees' conduct.[36] While respondents assume that this Court will adhere

[35]Jenkins noted the commonly held black opinion "that only the president or 'boss' of the company can effect permanent solutions to problems involving racial discrimination." *Ibid.*

[36]See Brief for the National Labor Relations Board, pp. 37-40 (June 1974).

to its sound practice not to consider issues which have not been raised, much less discussed, below, we nevertheless show here the utter lack of merit to this assertion.

Regardless of whether Hollins and Hawkins constituted a labor organization under Section 2(5) of the Act,[37] such designation does not ineluctably lead to the conclusion that their activities violated Section 8(b)(7)(A). Section 8(b)(7)(A), by its terms, requires a finding, first, that picketing occurred[38] and, secondly, that "an object thereof is forcing or requiring an employer to recognize or bargain with the labor organization . . . ." But, the case most heavily relied upon by the government—*N.L.R.B. v. Cabot Carbon Co.*[39]—itself demonstrates that not all labor organizations under Section 2(5) pursue a "bargaining" object.

[37]It is far from certain that Section 2(5) reaches the activities of two employees. They are, at most, a *de minimis* "labor organization". Moreover, it is significant that all of the cases cited by the government construe Section 2(5) in the context of employer interference with employee concerted activity. *Ibid.* The broad reading of the statutory definition served in those cases to protect employees' Section 7 rights. The government urges the opposite result here: that Section 2(5) be construed to proscribe concerted employee activity. It is noteworthy that the government cites no case—nor do respondents know of any—in which two employees have been deemed a Section 2(5) labor organization and their activities prohibited by Section 8(b)(7)(A).

[38]To the contrary, the record is uncontroverted that no picketing occurred in this case. Hawkins and Hollins were discharged because they passed out handbills protesting racial discrimination. As their termination slips stated: "You are being discharged today. Distribution of Boycott Emporium literature on Saturday, November 9, 1968, in front of the Emporium . . . ." (Pet. App., p. 10, n.18). No party to this litigation even suggests that Hawkins and Hollins engaged in any other or different conduct.

[39]360 U.S. 203 (1959), cited in the Brief for the N.L.R.B., pp. 37-38.

"Certainly nothing in that section [2(5)] indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'" 360 U.S. at 211. See also *National Packing Co. v. N.L.R.B.*, 377 F.2d 800, 803 (10th Cir. 1967). Since the mere existence of a labor organization cannot violate Section 8(b)(7)(A), violation of that section thus depends on the nature of that organization's activity.

Both the legislative history of Section 8(b)(7)(A) and the long line of cases construing that provision make clear that the coverage of this section proscribes only organizational and recognitional picketing, not informative picketing designed, for example, to publicize an employer's unfair labor practices. 2 *Leg. Hist. L.M.R.A.*, 1361, 1384, 1429, 1717 (1947); *C. A. Blinne Constr. Co.*, 135 N.L.R.B. 1153, 1168, n.29 (1962); see also A. Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 267 (1960).

Even assuming, *arguendo*, that Hollins and Hawkins were a labor organization and that they had engaged in picketing, their conduct would still not fall within the proscription of 8(b)(7)(A) unless their intent in picketing were recognitional or organizational. But the handbill which Hawkins and Hollins circulated refutes any such conclusion. The leaflet's message is plainly informational. It is an effort to tell others of racial discrimination at The Emporium and cannot sensibly be confused with picketing by a labor organization seeking recognition.

Thus, the object of the minority employees' picketing was not at all "to coerce the Company to bargain with them concerning conditions of employment . . . ." Brief for the N.L.R.B., p. 38. Rather, it was to disseminate information about racial discrimination at The Emporium, a condition which was in direct violation of the anti-discrimination clause of the collective bargaining agreement (see note 6, *supra*) and of Title VII of the Civil Rights Act. While it is true that the two blacks hoped to talk with the president of The Emporium about racial discrimination (Pet. App., p. 8), it is grossly inaccurate to characterize this as an attempt "to coerce the Company to bargain with them concerning conditions of employment."[40] By strict adherence to the collective bargaining provision which prohibited racial discrimination in "hire, tenure or job status", the company would have satisfied totally the demands of Hollins and Hawkins. The company's duty was unambiguous. No negotiation was necessary to clarify the terms of the collective bargaining agreement or the mandate of the Civil Rights Act. Hollins and Hawkins were not seeking, and accession to their requests did not require, a "continuing relationship" with the company. *Dallas Bldg. & Constr. Trades Council v. N.L.R.B.*, 396 F.2d 677, 683 (D.C. Cir. 1968).[41]

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[40]Brief for the N.L.R.B., p. 38. But see, Decision of N.L.R.B., Pet.App., p. 58, n.4 (Jenkins, dissenting).

[41]This case is therefore factually distinguishable from *Dallas Building*, in which an outside labor organization, a construction trade council, demanded an agreement with a construction employers' association which would have required the association to subcontract exclusively with locals affiliated with the council. In none of the agreements which the association then had with

Were this Court to hold that Hawkins and Hollins had violated Section 8(b)(7)(A), that provision would have been expanded far beyond the meaning ascribed to it by Congress, and an essential distinction between two forms of picketing will have been disregarded. As the National Labor Relations Board said in what is perhaps its leading case interpreting Section 8(b)(7)(A):

> We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist. *C. A. Blinne Constr. Co.*, 135 N.L.R.B. 1153, 1168, n.29.[42]

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council-affiliated locals were there subcontracting clauses. Thus, the demand of the association for a *new* and basic contract term could not be met without some form of negotiation, perhaps of some duration. This clearly is not the situation in the present case, where two employees were seeking compliance with an *existing* clause of a collective bargaining agreement.

Similarly distinguishable are two other cases relied upon by the government (Brief for the N.L.R.B., p. 38, n.17), *Centralia Bldg. Trades Council v. N.L.R.B.*, 363 F.2d 699 (D.C. Cir. 1966) and *National Packing Co. v. N.L.R.B.*, 377 F.2d 800 (10th Cir. 1967). In both cases, as in *Dallas Building*, the picketing labor organization made demands which would have involved both the establishment of a continuing negotiating relationship between the two parties and the alteration of the existing terms of employment.

[42]See also *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321 (1962) (picketing for area standards does not violate Section 8(b)(7)(A) because the employer is not required to recognize or bargain with the labor organization); *Fanelli Ford Sales, Inc.*, 133 N.L.R.B. 1468 (1961) (picketing directed at securing reinstatement of discharged employee does not violate Section 8(b)(7)(A)).

III. SINCE THE MINORITY EMPLOYEES' OPPOSITION TO EMPLOYMENT DISCRIMINATION IN THIS CASE SO MINIMALLY AFFECTED THE COLLECTIVE BARGAINING PROCESS, THEIR CONDUCT REQUIRED PROTECTION UNDER THE ACT.

As shown in the previous argument, *supra*, the employees' activity in this case did not constitute either bargaining or an attempt to bargain and, therefore, did not invoke the strictures of Section 9(a) exclusivity. But, even if Section 9(a) were deemed applicable, the employees' concerted activities nonetheless were entitled to the protection of the Act. This is so because Section 7 rights exercised to eliminate employment discrimination enjoy a special solicitude within the structure of federal labor policy.[43] Given this legal framework, the record makes plain that the employees' conduct impinged so slightly, if at all, upon the legitimate interests of either the Union or the employer that Section 9(a) principles do not deprive them of the Act's protection.

A. Section 7 of the Act Requires That Exclusivity Principles Be Subordinated to the Paramount Importance of the Minority Employees' Objectives.

Section 9(a) principles cannot be viewed in a vacuum. *E.g., Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942). Instead, effectuation of the national labor policy in general, and Section 7 rights in particular, requires that exclusivity principles be applied in light of the overriding federal objective to

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[43]As the Court of Appeals stated:

> [C]oncerted activity involving racial discrimination ha[s] a unique status in that the subject matter has independent statuory bases . . . (Pet. App., p. 20).

eliminate racial discrimination in employment. Thus, the fact that Hollins and Hawkins were exercising paramount constitutional and statutory rights, not simply a contract right, has profound implications in the accommodation of Section 7 and Section 9(a) interests under the Act. The balancing process shifts substantially in such a case.

A recent decision of this Court, *N.L.R.B. v. Magnavox Co. of Tennessee,* 94 S. Ct. 1099 (1974), illustrates the principle well. In *Magnavox,* the collective bargaining agreement authorized a total ban on employee distribution of literature on all of the employer's property at all times. This Court sustained the union's subsequent challenge to the no-distribution contract provision to which the Union previously had agreed, because the ban "might seriously dilute §7 rights." *Id.* at 1102. This Court held that it was not within "the powers of the collective-bargaining representative to waive those rights." *Ibid.*[44] Conflicting interests were balanced to effectuate national labor policy, and statutory rights, expressing important Congressional policy, displaced contractual arrangements. The present case calls for exactly the same result.

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[44]As Mr. Justice Stewart recognized in his separate opinion in *Magnavox:*

> Although the union is deemed to represent all employees in the bargaining unit, both pro-union and anti-union, and may waive important §7 rights in the course of collective bargaining, presumably in return for management concessions on other fronts, this authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests. *N.L.R.B. v. Magnavox,* 94 S.Ct. 1099, 1103 (1974) (concurring in part and dissenting in part).

Hawkins and Hollins, of course, were exercising statutory, if not constitutional, rights of the "highest priority." *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). Accordingly, it would be illogical in the extreme if contractual arrangements by the parties, which added nothing to pre-existing rights of such weighty origin, were able to waive or preclude their exercise. Similarly, given that Congress has specifically prohibited discrimination by either an employer or union (Section 703 of Title VII, 42 U.S.C. § 2000e-2), it would be even more incongruous to accord exclusivity principles a paramount position when racial employment discrimination exists. But such would be the result if the two employees' activities were deemed to contravene Section 9(a). While exclusivity and encouragement of contractual grievance processes are not to be disregarded, neither may they be seized upon to prevent the elimination of discrimination.

Other decisions of this Court safeguard the primacy of important statutory rights in the face of efforts by private parties to defeat them or simply to effectuate them differently. In *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351 (1971), for example, this Court held that a statutory remedy for seamen's wages claimed could not be abrogated by a contractual arbitration process. It was urged in that case, as it is in this one, that union prestige, employer convenience and policy favoring private settlement of disputes were endangered, but this Court declined to strip individual seamen of their statutory rights. *See also*

Alexander v. Gardner-Denver Co., 94 S. Ct. 1011 (1974).

Moreover, in *Mastro Plastics v. N.L.R.B.*, 350 U.S. 270 (1956), employees subject to a contractual no-strike provision were protected when they struck in response to their employer's unfair labor practices which were destructive of the "foundations" of the bargaining contract. Recognizing the high priority which Congress has accorded the elimination of racial discrimination, the employees in the present case, *a fortiori,* should be protected by the N.L.R.A. for their concerted effort to achieve this goal. Gould, *Black Power in the Unions: The Input on Collective Bargaining Relationships,* 79 Yale L. J. 46, 55-56, 69-70 (1969).

B. The Record Shows That the Employees' Conduct Impinged Slightly, If At All, Upon the Possible Legitimate Interests of Either the Union or the Employer.

In light of the considerations discussed in subsection A, *supra,* it would be anomalous, indeed, to penalize Hawkins and Hollins, under the guise of deference to Section 9(a) principles, simply because their Union's collective agreement contained non-discrimination and dispute settling provisions. Moreover, the cases recognize the comparative insignificance of general non-discrimination pledges unaccompanied by vigorous efforts of both union and management, in fact, to eliminate discriminatory practices. These were precisely the kinds of efforts which were absent in this case and which necessitated the employees' abandonment of the contractual dispute settling ma-

chinery.[45] *United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126, 1132, n.10 (D. C. Cir.), *cert. denied,* 396 U.S. 903 (1969); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 14 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967); Note, *Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination,* 72 Mich. L. Rev. 313, 321 (1973). Under these circumstances, Section 9(a) prohibits only those activities which substantially endanger possible legitimate union and employer interests. In this case, the lower court found that the minority employees' activities had no such impact (Pet. App., p. 24).

1. Impact on Possible Legitimate Union Interests.

There can be little dispute with the lower court's finding that, given the singular nature of the employees' objective, any interference with Section 9(a) principles which the employees may have caused was minimal and legally tolerable (Pet. App., p. 24). The court observed, first, that Hawkins and Hollins had earnestly attempted to utilize their Union, abandoning

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[45] In fact, that machinery produced exactly the kind of counter-productive effect which the employees anticipated. Thus Hawkins testified as to their concern that "if we talked as individuals, well, they could only have a few cases, they would satisfy a few" (Pet. App., p. 7, n.12). That is precisely what happened: one, perhaps two, minorities did receive promotions. Minorities as a class benefitted not at all; systemic discrimination continued. Ironically, the Board's Trial Examiner seized upon these two promotions to state that there was only insubstantial discrimination at the store (*id.* at 92) and to find that "[a]ll the evidence indicates that the Union . . . was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention . . ." (*Id.* at 103).

it only when futility was apparent. *Ibid.*[46] Both the lower court in this case and the Ninth Circuit Court of Appeals have found Section 9(a) principles to commend initial utilization of union processes even where the employees' complaint involves racial discrimination. *Ibid.; N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, 221 (9th Cir. 1969).

However, in analogous situations, this Court has not required that even contract grievances, much less statutory rights, be pursued under the contract where the pursuit is obviously futile. In *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965), this Court noted the general rule that "employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure . . ." (emphasis in original). But, this Court went on, the rule may no longer obtain in the event that the union refuses to press or only perfunctorily presses the claim. And, in *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969), this Court excused an employee from the rigid exhaustion requirements of the Railway Labor Act where both the union and employer had manifested hostility to the claim of racial discrimination. This Court stated that it "would be absolutely futile" for the employee in that situation to continue to "*attempt* to exhaust contractual remedies." *Id.* at 331 (emphasis in original). *See Petersen v. Rath Packing Co.*, 461 F.2d 312, 315 (8th Cir. 1972).

[46]To the extent that Section 9(a) imposes an exhaustion-of-remedies requirement, it is settled that exhaustion normally is not demanded where civil rights are at stake. *E.g., Damico v. California*, 389 U.S. 416 (1967).

Futility in the instant case was no less demonstrable. The employees waited seven months for even the possibility of a meaningful remedy for discrimination. Then, the grievance mechanism finally provided—the meeting of the adjustment board—proved to be structured so that effective response to their complaint was utterly impossible. Further deference to the contractual grievance machinery simply was both useless and unjustified.

Secondly, the Court of Appeals recognized that the Union and employees, in fact, were not at cross purposes (Pet. App., pp. 25-26). The Union's official position endorsed the employees' objective which, in turn, related to the non-discrimination provision in the union-management contract. Both the Union and the employees recognized the need to eradicate racially discriminatory practices at The Emporium.[47] The Union's willingness to meet with and hear the minority employees' complaints, its communications to management, its efforts to adjust two individual problems and its filing of grievances after the employees' discharges: from all these facts, Union concurrence with the employees must be inferred.

Whatever doubt persists that the minority employees' activities may have jeopardized the Union's interests is dispelled wholly by the Union's *amicus* appearance before this Court. Amicus Curiae Brief of Department Store Employees Union, Local 1100

[47]Indeed, the court—relying on *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) and *Local Union No. 12, United Rubber Workers v. N.L.R.B., supra*—noted that any contrary stance of the Union would have been unlawful (Pet. App. p. 26, n.38).

(August 1974). That brief unequivocally supports Hawkins and Hollins and unequivocally disposes of any contention or conjecture that the Union felt, was, or has been undermined by the employees' efforts. The Union's brief first recognizes the uncontested facts that the employees initially went to the Union and, for a substantial time, "worked solely within the Union in dealing with the problem of discrimination." *Id.* at ..... The Union in fact commends Hollins and Hawkins because

> to a certain extent they were central figures initiating action which brought the problem of discrimination to the attention of both the Union and Company. *Ibid.*

Indeed, the Union credits the two minority employees since "as a result of their activity, it became the Union's official position that the Company engaged in racial discrimination." *Ibid.*[48] As the Union brief recognizes, the facts here "set this case miles apart from many of those in which a union's action demonstrated open conflict with the minority employee group." *Ibid.*[49]

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[48]The Union's brief points out two other important considerations demonstrating the close nexus between the Union and employees' positions. First, Hawkins' and Hollins' activities were neither in breach of any provision of the collective bargaining agreement nor "disrupt[ive of] the on-going relationship between the Company and Union." Amicus Curiae Brief of Union, p. ..... Secondly, the Union acknowledged "that the two employees' refusal to participate in the on-going grievance process *created no disruption* to the bargaining relationship." *Ibid.* (emphasis added).

[49]For the same reasons, the "wildcat" and "schism" cases upon which the government relies are plainly inapposite. As an initial matter, none of them involves employee activity of such overriding national significance as the employees' objective here. Secondly, the line of "derogation" cases (Brief for the N.L.R.B., pp. 18-20), which followed *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) and *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969), concerns internal union affairs and discipline, issues not presented in this case. *Cf., N.L.R.B. v. International Brotherhood of Electrical Workers*, 42 U.S.L.W. 5059 (U.S. Sup. Ct., June 24, 1974).

Nor are *N.L.R.B. v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) and its line of cases applicable. Brief for the N.L.R.B., pp. 19-20. In *Draper* the employees attempted to usurp the union's role by engaging in a wildcat strike during the course of bargaining negotiations. There could be no time nor action more critical to the fundamental purpose of a union. And the court characterized the employees' actions there as irresponsible. By complete contrast, Hollins and Hawkins could hardly be thought irresponsible. They reluctantly undertook separate action, peacefully and unobtrusively, in a manner calculated least to interfere either with the Union's reputation and role or with the operation of their employer's business.

Under the circumstances present here, then, it is idle to speculate about imagined dangers which the employees' remarkably innocuous leafletting may have caused to abstract exclusivity principles or to the general union movement. See *e.g.*, Brief for the N.L.R.B., pp. 21-23; Recent Cases, 87 Harv. L. Rev. 656 (1974). These fears have no relation to the realities of this case. The Union's brief to this Court and the facts in the record dramatically refute such fears. The more prevalent and profound danger is the persistence of racial discrimination in employment.

2. Impact on Possible Legitimate Employer Interests.

Even when examined from the employer's perspective, the minority employees' activities did not impinge upon any substantial legitimate interest of The Emporium. Several important principles compel this conclusion. First, the cases, as well as the statutes, *e.g.*, Title VII, make it clear that employers not only have a duty to provide equal employment opportuni-

ties to their minority employees, but that this duty can be breached though the employer never intended to design or even to perpetuate discriminatory conditions. *E.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Secondly, where such discrimination exists, the employer, even though party to a collective bargaining contract, can be compelled unilaterally to eliminate discrimination. *E.g., Ostapowicz v. Johnson Bronze Co.,* 369 F. Supp. 522 (W.D. Pa. 1973); *U.S. v. Local 189, Papermakers,* 282 F. Supp. 39, 42-44 (E.D. La. 1968), *aff'd,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). Moreover, collective bargains are no obstacle to the fashioning of relief to end discrimination.

> [W]hatever contractual agreement may exist between the company and [the union] in the form of a collective bargaining agreement cannot and does not preclude the implementation of [effective relief]. *United States v. Bethlehem Steel Corp.,* 5 E.P.D. ¶7988, at p. 6638 (W.D.N.Y. 1972).

It hardly comports with this description of an employer's unambiguous duties to hear The Emporium complain in this case that it was intolerably burdened by the employees' request to discuss the problem of racial discrimination at its store.[50] For one thing, Section 9(a) was intended simply to permit an employer to hear and adjust grievances without fear of a Section 8(a)(5) duty to bargain violation. The Emporium has not been charged with such activity. To the extent that Hawkins' and Hollins' purpose was to

[50]Brief for The Emporium, pp. 7-9, 14-15 (May 1974).

present a grievance, Section 9(a) expressly authorized them to do so, and likewise authorized their employer to provide the parity for minority employees which they sought.

The Emporium was on notice, at least after it received the Union's April 11 report (Pet. App., p. 4; A. 108-113), that its employees and their Union demanded action to eliminate discrimination at the store.[51] The record in no way suggests that the company ever recognized any duty to take such action. Instead, what the company did was to discharge Hawkins and Hollins because of their leafletting in opposition to the discrimination.[52] For all of these reasons, the Court of Appeals refused to allow the company to discharge employees because those employees wished to persuade it to do what federal labor policy requires. This is most certainly not the sort of "conflicting demand" which the Section 9(a) principle was intended to preclude. As the lower court put it:

[51]Indeed, the company could have informed itself of such problems had it chosen to examine its own periodically prepared EEO-1 reports. *E.g.,* A. 120; see also note 28, *supra.*

[52]The employees' conduct is admitted by all parties to have been peaceful, decorous and unobstructive. There is thus complete contrast between their leafletting and that of the employee in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973). In that case the employee was guilty of criminal conduct, directed against his employer, which this Court called "deliberate" and "unlawful". 93 S.Ct. at 1825. Contrary then to the government's claim (Brief for the N.L.R.B., p. 40), whether the distinction be made between criminal and non-criminal, violent and non-violent, or disruptive and non-disruptive conduct, the considerations operative in *McDonnell Douglas* have utterly no relevance here.

> We can see nothing in that principle, however, which indicates that it was intended to be used as a shield to protect an employer from the "burden" of having to deal with two groups on the same subject. We cannot agree that any inconvenience which the Company might experience in being required to bargain with the minority here while still participating in the grievance procedures justifies withdrawing Section 7 protection from these concerted activities (Pet. App., p. 29).

IV. AFFIRMANCE OF THE DECISION BELOW RECOGNIZES THE N.L.R.B.'S DUTY AND ABILITY TO ELIMINATE RACIAL DISCRIMINATION IN EMPLOYMENT.

Much of the government's brief in this case is devoted to asserting the impropriety of the Labor Board's involvement in—and its inability to effect—the elimination of racial discrimination in employment. This contention would seem to echo the Trial Examiner's unfortunate parenthetical statement: "we do not belong in the contemporary civil rights struggle. Congress did not put us there" (Pet. App., p. 101). Precisely the opposite is true: the N.L.R.B. must assume its responsibilities in the implementation of federal labor policy, as the previous discussion, the cases and the decision of the Court of Appeals here all demand. *E.g., Southern Steamship Co. v. N.L.R.B., supra.*

Furthermore, the lower court has shown that implementation of this overriding mandate, and the administration of the N.L.R.A. within the context of this

mandate, can be accomplished comfortably by a balancing of different provisions within the Act.[53] While the petitioners' briefs conjure up a myriad of obstacles which supposedly prevent N.L.R.B. engagement in effectuation of this mandate, respondents' argument in this section of their brief demonstrates that these hypothetical problems bear no relationship to this case.

A. The Availability of Alternative Remedies Neither Prevents, Nor Diminishes the Desirability of, the Board's Role in Eliminating Employment Discrimination.

In their briefs, petitioners strongly contend that Hawkins and Hollins could not invoke the protection of the Labor Act because of the availability of other remedies for employment discrimination. Brief for the N.L.R.B., pp. 26-29; Brief for The Emporium, p. 5. Unaccountably, petitioners fail to perceive the principles articulated last term in this Court's unanimous opinion in *Alexander v. Gardner-Denver Co.*, 94 S. Ct. 1011 (1974). That decision provides compelling authority that, when an individual acts to vindicate the important congressional policy against discriminatory employment practices, the availability of one remedy or forum does not preclude resort to another. Thus, this Court reversed lower court decisions preventing an employee, whose racial claim had been

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[53]Senior District Judge Wyzanski, in his separate opinion, rejects the majority's balancing of Sections 7 and 9(a). He would find the policy against discrimination so compelling, and the likelihood of union-management effectuation of that policy so unlikely, that Section 9(a) principles must give way to authorize minority demands (Pet. App., pp. 31-53). See also Gould, *supra*, 79 Yale L.J. 46 (1969); Note *supra*, 72 Mich. L. Rev. at 320, 321, 325 (1973).

fully arbitrated adversely to him, from subsequently bringing that claim into court. The lower courts had relied upon "notions of election of remedies and waiver and [on] the federal policy favoring arbitration of labor disputes," *id.* at 1018, but such reliance was misplaced.

This Court found such notions largely inapplicable to this field, in which Congress has "evinced a general intent to accord parallel or overlapping remedies against discrimination." *Id.* at 1019. As this Court noted, the legislative history demonstrates the congressional intent to provide independent, and even successive, forums for discrimination remedies under the numerous applicable state and federal enactments. The debates not only imply congressional intent to provide alternative remedies for employment discrimination, but expressly single out the N.L.R.A. as one of those remedies still in place after enactment of Title VII.[54] Moreover, given this Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), Hawkins and Hollins could clearly have invoked the protection of Section 704(a) of Title VII had they sought their remedy under that Act. To deny them relief in this case could only mean that the N.L.R.A. affords them no similar protection. Yet, not only do judicial and Congressional statements require N.L.R.B. protection of claims based on racial

[54]See note 24, *supra.* The courts of appeal also have concluded that the N.L.R.B. retains jurisdiction and responsibility over claims of employment discrimination on racial grounds. *E.g., Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 996-997 (D.C. Cir. 1973); *United Packinghouse Workers Union v. N.L.R.B., supra,* 416 F.2d at 1133, n.11.

discrimination, of the kind present in this case, but there are persuasive policy considerations that lead to the same result.

1. Administrative Handicaps Militate Against Exclusive Reliance on Title VII Remedies in All Cases of Employment Discrimination.

The government has urged that Hawkins and Hollins should be denied the Act's protection because Title VII provides a sufficient remedy for employment discrimination. Brief for the N.L.R.B., pp. 27-28. Respondents agree that the employees' discharges, in addition to violating N.L.R.A. Section 7, were expressly prohibited by Section 704(a) of Title VII. But, as *Macklin v. Spector, supra,* 478 F.2d at 996, indicates, E.E.O.C. processes should not be regarded as the "centerpiece of the nation's commitment to ending unfair discrimination in employment and a *sine qua non* in all employment discrimination cases." *Accord, Alexander v. Gardner-Denver Co.,* 94 S. Ct. 1011, 1018 (1974).

E.E.O.C. processes are slow and becoming slower. Its caseload is increasing at an accelerating rate. More than three years ago, its backlog was 32,000 cases; charges customarily require two years to be processed. Note, *supra,* 72 Mich. L. Rev. 313, 320, n.47. Court delay, combined with this administrative backlog, seriously impair the value of E.E.O.C. remedies.[55]

[55]One authority, having noted the E.E.O.C.'s lack of cease-and-desist power, goes on to observe:

> Primarily because the N.L.R.B. bears the expenses of enforcement of the N.L.R.A., offers the other general advantages of administrative enforcement, has a backlog time before the N.L.R.B. six months shorter than before the federal district

2. The Heavy Burden of Proof in Establishing a Breach of the Duty of Fair Representation Renders Such Suits An Illusory Remedy for Employment Discrimination.

The government's suggestion that minority claims may be remedied by proof that their union has breached its duty of fair representation is equally unsatisfactory. Brief for the N.L.R.B., pp. 26-27.[56] The duty of fair representation under L.M.R.A. Section 301 imposes on an exclusive bargaining agent the statutory duty to serve those it represents fairly, honestly, in good faith and without hostility. *E.g., Humphrey v. Moore,* 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). The duty, however, does not reach all meritorious claims of an aggrieved member, for "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Ford Motor Co. v. Huffman, supra,* 345 U.S. at 338. Indeed, the claimant must prove not only the merits of his case, but also must affirmatively show that the union was acting in bad faith. *Vaca v. Sipes,* 386 U.S. 171

courts, and has no express requirement to defer to state [Fair Employment Practices] agencies, representatives of civil rights organizations have preferred N.L.R.B. enforcement over Title VII enforcement . . . . Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Inter-agency Relations,* 34 Geo. Wash. L. Rev. 846, 887 (1966).

[56]Respondents emphasize that this case was not litigated, nor is it now presented, on a duty of fair representation theory. The Court of Appeals' decision does not rest upon that basis, either. In fact, the case presents the issue of whether the N.L.R.B. is an available forum for claims of racial discrimination when the union (1) has been asked, but was unable, to provide an effective remedy for discrimination, and (2) is *not* charged with having, or proved to have, breached its duty of fair representation.

(1967).[57] As this Court itself recognized last term in *Alexander v. Gardner-Denver:*

> A breach of the union's duty of fair representation may prove difficult to establish. See *Vaca v. Sipes; Humphrey v. Moore.* In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. 94 S. Ct. at 1025, n.19 (citations omitted).

Employer discrimination is no less tractable to remedy by means of a Section 301, 29 U.S.C. §185, suit. To establish a breach of contract, the employee must first overcome the not insubstantial hurdle of proving a breach of the union's duty of fair representation. *Vaca v. Sipes, supra.* Such a requirement may shield the employer from liability for acts of discrimination. *Id.* at 203-205 (Mr. Justice Black, dissenting); *cf., Tipler v. E. I. duPont deNemours & Co.,* 443 F.2d 125, 129 (6th Cir. 1971); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U. Pa. L. Rev. 40, 42-43 (1969).

3. The Inherent Deficiencies of Arbitration Preclude Reliance Upon It as An Exclusive Remedy for Employment Discrimination.

The government also argues that Hawkins and Hollins should have been restricted to pursuit of their contractual remedy: arbitration. Brief for the N.L.R.B., p. 26. This assertion is the inevitable conclusion of petitioner's Section 9(a) exclusivity argu-

[57]The test is no less rigorous when the claim is raised as a Section 8(b)(1)(A) unfair labor practice under the N.L.R.A. *Local Union No. 12, United Rubber Workers v. N.L.R.B.,* 368 F.2d 12 (5th Cir. 1966).

ment, which maintains that individuals are to be remitted to the rights and remedies gained—and dispensed—by the union.

This brief previously has demonstrated the inapplicability of exclusivity to minority employees' claims. See Section II, subsection A, *supra.* It has also shown this Court's refusal to relegate important federal rights to determination by private parties. *E.g., N.L.R.B. v. Magnavox Co. of Tennessee,* 94 S. Ct. 1099 (1974); *U.S. Bulk Carriers v. Arguelles,* 400 U. S. 351 (1971). The inherent limitations of arbitration of racial claims are fully explored in *Alexander v. Gardner-Denver Co.,* 94 S. Ct. 1011, 1022 (1974). If the arbitral decision is based on the collective bargaining agreement, from which the arbitrator's authority emanates, the minority employees' federal right—to be free from discrimination—may well go unenforced. If the arbitrator chooses the other course, attempting to construe statutory rights, then he has departed from his charter and the award is unenforceable. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

Commentators have elucidated the insurmountable institutional deficiencies of industrial arbitration in dealing with minority claims. Professor Gould has described many such defects. First, the arbitrator is necessarily responsive to the union and management which selected him, although they are often—as in this case—alleged to have caused, or at least tolerated, the discrimination. Unfortunately, minority workers generally are not allowed to intervene. Moreover,

"class" problems normally are not susceptible of arbitrable solution, as Hawkins and Hollins were keenly aware. Arbitration is ill-equipped to implement extra-contractual rights. Gould, *supra,* 118 U. Pa. L. Rev. 40, 46-52 (1969).[58]

Despite this heavy weight of authority, the government urges this Court to confine minority claimants to contractual arbitration processes whenever (1) the collective bargaining agreement bars discrimination[59] and (2) the union is making a good faith effort to process the grievance. Brief for the N.L.R.B., p. 36. What the second condition requires, however, is not simply good faith, but nearly unprovable bad faith. *Vaca v. Sipes,* 386 U.S. 171 (1967). Nothing less than demonstrable hostility is sufficient. The practical result of this requirement would be to stifle all minority claims whenever the majority of workers had selected a union and the union had agreed to a standard non-discrimination provision.

The Emporium argues for even more. Indeed, the company would prohibit activities of the kind involved in this case, because "[t]he subject of discrimination

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[58] *Accord,* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. Chi. L. Rev. 30 (1971); Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment,* 24 Arb. J. 88 (1969); Comment, *Policy Conflict: Should An Arbitration Award Be Allowed to Bar a Suit Under Title VII of the Civil Rights Act of 1964?,* 20 U.C.L.A. L. Rev. 84 (1972); Bennett, *Labor Law Meets Title VII: Remedies for Discrimination in Employment,* 6 Conn. L. Rev. 66 (1973).

[59] Probably more than 50 percent of collective agreements currently in effect expressly proscribe such discrimination. Comment, *supra,* 20 U.C.L.A. L. Rev. 84, 85, n.6 (1972). Nearly all agreements provide for arbitration. *Id.* at 85, n.7.

had already been considered in collective bargaining and resulted in a contract provision forbidding discrimination." Brief for The Emporium, p. 11. Under this test, minority claims would be stifled at least through the term of the collective agreement. Plainly, the Congress did not intend this result.

B. The Board is Well-Equipped to Assume the Role of Eliminating Racial Discrimination in Employment.

The decision of the Court of Appeals in this case requires the N.L.R.B. to assume its duty to effectuate, under the Act, the broad, compelling federal policy to eliminate racial discrimination in employment. Not only does Board assumption of this duty have sound policy justification (*United Packinghouse Workers Union v. N.L.R.B., supra,* 416 F.2d at 1133, n. 11) but the Board, with its labor relations expertise, is well suited to perform the balancing test which the court has prescribed. Thus, in *Bekins Moving & Storage Co. of Florida, Inc.,* 211 N.L.R.B. No. 7 (June 11, 1974), the Board—in determining that it henceforth would refuse to certify unions which had won a representation election, without examining claims that the union practiced racial discrimination—considered whether to issue rules to define the parameters of that examination. The Board concluded that "we are not yet sufficiently experienced in this newly developing area of the law" to establish such rules. *Bekins, supra,* at p. 11 of the slip opinion. The Board, therefore, adopted the following procedure:

> It will thus be our task, on a case-by-case basis, to determine whether the nature and *quantum* of the proof offered sufficiently shows a propensity for unfair representation as to require us, in order that our own action may conform to our constitutional duties, to take the drastic step of declining to certify a labor organization which has demonstrated in an election that it is the choice of the majority of employees. . . . To reconcile these views with a full awareness of our own constitutional responsibilities will, we recognize, not always be an easy task, but the difficulties involved do not entitle us to shrug off our oath to uphold and defend the Constitution of the United States. *Id.* at pp. 6-7.

In *Bekins,* then, in the face of strong considerations of majoritarian principles, the Board undertook to evaluate, on a case-by-case basis, the substantiality of claims of racial discrimination. Precisely this same approach is required by the Court of Appeals' decision here. In the present case, the Board might have examined (1) the employer's truculence, (2) the Union's inability to provide an effective remedy, (3) the employees' good faith and (4) the degree of their interference with the employer's business and the union's legitimate role. Note, *supra,* 72 Mich. L. Rev. 313, 328 (1973).

In other contexts, the courts and the Board have not hesitated to implement the purposes of the Act through case-by-case development of broad duties which are not susceptible of simple articulation. For example, since 1944, successive decisions have refined and applied the principle contained in the phrase "duty of fair representation" to the vast spectrum of

factual situations which present themselves to an administrative agency. *N.L.R.B. v. Mansion House Center Management Corp.*, 473 F.2d 471, 477 (8th Cir. 1973); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1823-1826 (1973).

Finally, Board administration of the standards articulated by the Court of Appeals will have the inevitable and important effect of encouraging union and management to be more responsive to the grievances of minority groups.[60] This may, as Professor Gould suggests, take the form of creating "special machinery which will bring dissident [minority] workers into the collective bargaining process." Gould, *supra*, 79 Yale 46, 84 (1969).[61] In any event, adherence to the Court of Appeals' approach will minimize disruption and effectuate the important goal of industrial stability.

---

[60]As the Union's brief states, affirmance of the decision below "serves to encourage dissident employees to pursue their disputes within their own labor organization with some flexibility for divergence in approaches." Amicus Curiae Brief of Department Store Employees Union, Local 1100, at p. .....

[61]Tripartite discussion of minority complaints has been recommended by other authorities. *E.g.*, Blumrosen, *supra*, 24 Arb. J. 88 (1969), who analogizes to E.E.O.C. conciliation processes, where all three parties—minority claimants, union and management—are represented. *Id.* at 99-105. Indeed, had The Emporium wished to respond to Hawkins' and Hollins' complaint other than by discharging them, it could have requested the E.E.O.C.'s "technical assistance" to further its "compliance" with Title VII purposes. Section 705(g)(3) of Title VII, 42 U.S.C. § 2000e-4(g)(3); see also Sections 705(g)(4) and (5), 42 U.S.C. §§ 2000e-4(g)(4) and (5).

If the employees' activities were characterized as a grievance, tripartite discussion would have been practicable. N.L.R.A. Section 9(a) authorizes presentation and adjustment of employee grievances by employers and provides for the union's presence at such a presentation.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Dated, August, 1974.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITONER THE EMPORIUM CAPWELL CO.

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REPLY BRIEF FOR PETITONER THE EMPORIUM CAPWELL CO.

INTRODUCTION

The principal argument of both respondent WACO and the Department Store Employees Union, Local 1100 (*amicus curiae*), is that the activities of Hawkins and Hollins did not amount to a demand for bargaining. Both WACO and the Union argue (a) that Hawkins and Hollins were merely seeking to present a grievance and (b) that they were merely publicizing a dispute.

The second argument of both parties is that the activities of Hawkins only minimally affected the Union's operations.

Third, the Union argues (Union Br. 11) and WACO agrees (Resp. Br. 30) that Hawkins and Hollins were not discharged for attempting to bargain but merely for leafletting.

Here WACO and the Union part company. WACO argues that the exclusivity provided by Section 9(a), Labor Management Relations Act must be subordinated to the paramount importance of the minority employee's objectives. (Resp. Br. 39.) The Union refuses to discuss this question, saying that "the case does not require the resolution of this difficult issue." (Union Br. 10.)

In addition, although WACO is silent on the subject, the Union strongly objects to the action of the court below in setting a standard of unions' responsibility for representation in discrimination cases sharply differing from the standard established by this Court in *Vaca v. Sipes,* 386 U.S. 171. (Union Br. 24, fn. 20.)

ARGUMENT

I. EVIDENCE AMPLY SUPPORTS FINDING THAT HAWKINS AND HOLLINS ATTEMPTED TO ENGAGE IN COLLECTIVE BARGAINING.

A. This finding by the NLRB was not disturbed by the court below.

Both respondent and the Union as *amicus curiae* argue before this Court that Hawkins and Hollins did not attempt collective bargaining. This contention has no support in the decision of the Trial Examiner, the NLRB or the court below. In urging as their principal argument that Hawkins and Hollins were not attempting to engage in collective bargaining, WACO and the Union undertake to prove that the Trial Examiner was wrong, the Board was wrong and that all the judges on the court of appeals were wrong on this issue.

The Trial Examiner declared:

> "The evidence further establishes that this was no mere presentation of a grievance, but nothing short of a demand that respondent bargain with the picketing employees for the entire group of minority employees." (Pet. App. 103.)

The Board adopted the findings, conclusions and recommendations of the Trial Examiner, adding:

> "For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and *seeking to initiate direct negotiations with respondent* by picketing and boycott activities were not protected by the Act." (Pet. App. 55.) (Emphasis supplied.)

A majority of the court below said:

> "Petitioners argue that they only wanted to 'talk' with the Company's president and 'discuss' the situation. They dispute the Trial Examiner's finding that Hawkins and Hollins activities were 'no mere presentation of a grievance, but nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees'. TXD at 14. *However, we can see no reason to disturb this finding.*" (Pet. App. 24, fn. 34.) (Emphasis supplied.)

Dissenting Judge Wyzanski stated it even more forcefully. He said:

> "In the case at bar the facts as viewed by the NLRB make it plain that Hawkins and Hollins sought to present to the management of Emporium *not their personal grievances,* such as their individual failure to be accorded their due under the collective bargaining agreement, or such as the *adjustment of some wholly individual complaint.* What those two men wanted was a *change in management's policies* in promoting, hiring, and otherwise treating that class of workers within the unit who were not white in color. [Citations omitted.] *There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from and adjustment of grievances.* (Pet. App. 42.) (Emphasis supplied.)

As Judge Wyzanski pointed out, Hawkins and Hollins did not seek to present their personal grievances or the adjustment of some wholly individual complaint. Respondents themselves pointed out that Hawkins and Hollins objected to the fact that the Union intended to confine the scope of the grievances to employees in only one department of the store. (Resp. Br. 6.)

Respondent quotes Hollins as follows:

> ". . . We didn't want to have our cases taken as an individual thing . . . . [W]e wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store." (Resp. Br. 6-7.)

Respondent later declares "they leafletted because racial discrimination at The Emporium persisted . . . . *When, eventually, they abandoned the Union, they* did so to compel their employer *to cease discrimination where they worked.*" (Resp. Br. 19.) (Emphasis supplied.)[1] Finally respondent states: "Secondly, their objective was to remedy that discrimination for all minorities." (Resp. Br. 29.)

B. Hawkins and Hollins' conduct was not the presentation of a grievance within the meaning of Section 9(a) of the LMRA.

Section 9(a) of the LMRA states:

> "*Provided,* that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with

[1]Contrary to the repeated assertions by WACO that discrimination in fact existed (Resp. Br. 2, 3, 5, 7, 17, 19, 32), the record fails to show that any discrimination existed. In fact the General Counsel disavowed any intention of establishing that it did exist. (Pet. App. 90-91.)

> the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

The only reasonable interpretation or construction that can be placed on this language is that it refers to individuals presenting their own personal grievances or to a group presenting grievances limited to the members of that group.

That is not what Hawkins and Hollins sought to do. They not only wanted to correct all alleged discrimination throughout the store but attempted to represent all minority employees in doing so.

There is another reason why this could not constitute the presentation of a grievance within the meaning of Section 9(a). If Hawkins and Hollins without authorization from anyone could present a grievance on behalf of all minority employees, they could effectively destroy the rights of those employees to present their own grievances personally. Furthermore, the Union was never given "an opportunity to be present at such adjustment" as required by Section 9(a).

Finally, the grievance was not presented to the employer.[2] The employer in this case was San Francisco Retailers Council as the representative of all

[2]See, for example, Morris, "*The Developing Labor Law,*" Section of Labor Relations Law ABA, 1971, p. 236:

> "Once the unit is formed, the multi-employer group becomes the employer for purposes of bargaining, with the obligation under Sections 8(a)(5) and 8(d) to bargain collectively with the representative of all the employees in the unit."

stores, parties to the multi-employer contract. The Union correctly presented its grievance to the Council as the employer under the collective bargaining agreement. Hawkins and Hollins did not.

C. Testimony proves intent to bargain.

Hawkins and Hollins made it clear in their testimony what they were trying to do. Hawkins testified as follows:

> "Q. (By Mr. Bahrs) You appeared before the union and asked the union to do what, sir?
>
> A. We were talking about brown, yellow and red people, black, too.
>
> Q. Were you asking *the union* to appear before the San Francisco Retailers Council on behalf of all brown, red and yellow people?
>
> A. *We were trying to represent them.*" (A. 32-33.)

Hawkins further testified as follows:

> "Q. Did you appear at the meeting of the adjustment board on the 18th?
>
> A. Yes, I did, we did.
>
> * * *
>
> Q. And will you tell us what took place at that meeting?
>
> A. Mr. Hollins made a statement that we were not going to speak at this meeting as individuals, we were speaking as a group and *our main purpose was to talk to the President to try to reach an agreement with him* to straighten out the problems and conditions of The Emporium." (A. 35.)

It would be difficult to state an intent to bargain any more plainly than this. Hollins testified:

"Q. (By Mr. Kintz) Just to carry it one step further, it was my understanding that what you were trying to do and you didn't want a solution of the problems of individuals, *you wanted some basic change that would benefit the treatment of all minority people,* is that right?

A. That's correct." (A. 61.)

In his testimony concerning the press conference, Hawkins stated:

"Q. (By Mr. Barton) What were you seeking?

A. To try to talk to top management to get better conditions for The Emporium.

Q. How were you going to do this?

A. Through group talks and through the president if we could talk to him." (A. 11.)

Hawkins later stated: ". . . and the purpose of the meeting, of talking to the president was to try to get better conditions, and this was the main purpose of it." (A. 11.)

D. No evidence in the record fairly detracts from the finding that Hawkins and Hollins attempted to engage in collective bargaining.

We are mindful of the admonition in *Universal Camera Corp. v. NLRB,* 340 U.S. 474, that the Court should take into account whatever in the record fairly detracts from the weight of the evidence but we are unable to discover anything in the record indicating no intent to engage in collective bargaining other than the absence of a finding that Hawkins and Hollins sought to obtain a formal written document setting forth the terms and conditions of em-

ployment for minority employees. But as the respondent's brief pointed out:

"The collective bargaining agreement created contract rights; Hawkins and Hollins attempted to *achieve realization of these rights* for minorities." (Resp. Br. 31.) (Emphasis supplied.)

And as the General Counsel brought out, Hawkins and Hollins wanted some basic change that would benefit the treatment of all minority people. (A. 61.) Finally, the Union brief states:

"Hollins made a statement to this effect and indicated the minority employees wanted a group solution to the problem and desired to talk with the Company's president *to deal with the general problem of discrimination.*" (Union Br. 8.) (Emphasis supplied.)

Thus, Hawkins and Hollins sought to effect basic changes that would benefit all minority people through discussions with the company's president. Although this may not have the formality of the customary bargaining proceeding, it nevertheless constituted an attempt to bargin collectively.

There is no evidence in the record that "fairly detracts" from Hawkins' testimony that "our main purpose was to talk to the president and to try to *reach an agreement with him.*" (A. 35.)

On this record the finding by the Trial Examiner, the Board and the court below that Hawkins and Hollins attempted to bargain with their employer should be sustained.

II. ACTIVITIES NOT MERE FREE SPEECH

Respondent and the Union argue that all that Hawkins and Hollins were doing was peacefully publicizing their claim that the Emporium was guilty of racial discrimination.

This argument completely ignores the fact, as found by the Board, that Hawkins and Hollins attempted to establish a boycott of the Emporium while still in its employ. It also ignores the fact, as found by the Court of Appeals, that Hawkins and Hollins "rendered essentially ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 24.)

Finally it ignores the fact that Hawkins and Hollins attempted to represent all minorities and to bargain with the management of the Emporium on their behalf. These activities went far beyond the mere exercise of their constitutional right of free speech.

III. FINDING THAT HAWKINS AND HOLLINS ACTED IN DEROGATION OF UNION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

A. Both the NLRB and the Court of Appeals found that Hawkins and Hollins' conduct interfered with the collective bargaining process.

The Trial Examiner stated:

> "In sum, to extend the protection of the Act to the two employees named in the complaint would seriously *undermine* the right of employees to bargain collectively through representatives of

> their own choosing, *handicap and prejudice the employees' duly designated representatives in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities . . . .*" (Pet. App. 104.) (Emphasis supplied.)

The Board stated:

> ". . . Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected *because in derogation of the duly designated exclusive bargaining representative.* For the reasons stated by the Trial Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act." (Pet. App. 55.)

The Court of Appeals did not disagree with the Board but said:

> ". . . nonetheless we recognize that such activity as was engaged in here *does interfere to a certain extent with the collective bargaining process.* In abandoning the grievance procedures and seeking to bargain on their own, the picketers here *rendered essentially ineffective* the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 23-24.)

Thus, there are three findings that Hawkins and Hollins acted in derogation of the Union. These findings are amply suported by the evidence. It is un-

disputed that Hawkins and Hollins walked out of the Adjustment Board hearing and this effectively prevented the Union from proceeding. Walter Johnson, Secretary-Treasurer of the Union testified:

> *"I feel very badly that we were not able to process it* after the testimony was not presented by the affected individuals, and this is very vital testimony, our attorney advised that it *would be very difficult to proceed to arbitration because we would not have a whole case to present."* (A. 76.) (Emphasis supplied.)

There is no evidence in the record that "fairly detracts" from the weight of the evidence that Hawkins and Hollins rendered essentially ineffective the effort of the Union to present grievances. The findings of interference should therefore be sustained.

B. The extent of such interference was sufficient to remove Hawkins and Hollins' conduct from the Act's protection.

We come now to an interesting thing. After finding that the conduct of Hawkins and Hollins rendered essentially ineffective the efforts of the Union to process the grievance, the Court said:

> "We cannot agree with the Board, however, that this *limited* interference *alone* is sufficient to remove these concerted activities here from the protection of the Act." (Pet. App. 24.) (Emphasis supplied.)

After pointing out that Hawkins and Hollins had first attempted to have their grievance adjusted by the Union and that they were "not working at cross-purposes", the court said:

> ". . . though the immediate adjustment board proceedings were disrupted, *this disruption cannot wholly destroy the protection afforded these employees by* section 7 . . . ." (Pet. App. 26.) (Emphasis supplied.)

It then remanded the case to the Board to inquire "whether the Union was actually remedying the discrimination to the *fullest extent possible by the most expedient and efficacious means."* (Pet. App. 28.)

It will be noted that the court did not hold (as the dissenting judge declared) that Hawkins and Hollins had an *absolute* right to do what they did because they were protesting racial discrimination. Rather, the majority said:

> "Where the union efforts fall short of this high standard, the minority groups concerted activities cannot lose the section 7 protection."

The court here seems to confuse the *extent of interference* with the conduct of the Union. Presumably, if the Union met the standards announced by the court below, the actions of Hawkins and Hollins were unprotected. In other words, the interference would not be a limited interference.

These standards are in conflict with the standards set by this Court in *Vaca v. Sipes,* 386 U.S. 171, and have no statutory authority.

C. The original application to the Union for assistance does not justify subsequent conduct of Hawkins and Hollins.

The court below said:

> "We agree with *Tanner* [*N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (9th Cir. 1964),

419 F.2d 216 (9th Cir. 1969)] that even when racial issues are at stake, one should be required to submit such disputes first to the union before one resorts to minority concerted activity." (Pet. App. 24-25.)

But the fact that Hawkins and Hollins *originally* sought help through the Union does not prevent their subsequent conduct from being an interference with and in derogation of the Union. In fact, in this case the interference and derogation was far more extreme than in *Tanner*. In this case, as the Trial Examiner stated, the Union was "endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention." (Pet. App. 103.)

In *Tanner* the opposite was true. The Union not only did nothing to help the employees but actually worked against them. Abramson dented a bumper on his truck and the next day he damaged the door of his truck. This was made the basis for his discharge. Abramson filed a grievance regarding his discharge but with adverse results. The union representatives on the arbitration panel, Lucas and Shore, voted with the employer to uphold the discharge. *Tanner Motor Livery, Ltd. and Martin Abramson,* 148 NLRB No. 137.

The Board stated:

"The examiner found that Abramson did not receive a fair and impartial hearing. The arbitration panel consisted of four members, Hughes, Barrial, Lucas and Shore. *Abramson could not possibly have obtained a favorable majority.*"

The Court of Appeals for the Ninth Circuit in reviewing this finding said as follows:

"The Board held that the decision under the grievance procedure did not prevent it from considering the propriety of Abramson's discharge. It cites Section 10(a) of the Act, 29 USC Sec. 160(a), and says that the body that decided to sustain the discharge was not impartial and that its procedure did not meet normal standards as to sufficiency, fairness and regularity. "(citations) we think that its conclusions are supported by the record. *Tanner does not attack them.*" (Emphasis supplied.)

N.L.R.B. v. Tanner Motor Livery, 349 F.2d 1.

We can see no sound basis for holding that the picketing in *Tanner* was unprotected because the employees never sought to act through the union but that the activities of Hawkins and Hollins *were* protected because they *originally* attempted to act through the Union.

In *Tanner,* Abramson picketed *after* he was fired with a sign saying "Jim Crow shop." Dorbin joined the picket line later. This in no way interfered with or prevented the union from doing its duty of attempting to eliminate discrimination. *Tanner* was decided on the basis of the failure to consult the union even though it may well have been an idle act because of the Union's attitude.

Here Hawkins and Hollins interfered with and prevented the Union from acting. Their conduct was directly and obviously in derogation of the Union, far more so than the conduct of the employees in

Tanner. Thus, the court of appeals' distinction between this case and *Tanner* does not support its decision.

D. Hawkins and Hollins were working at cross-purposes with the Union.

The court below said:

> "Second, we find it significant that the union and the petitioners were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment practices." (Pet. App. 25-26.)

In contrast, the Trial Examiner stated:

> ". . . It would be absurd to say that because they and the Union had a common ultimate objective, these four employees were somehow implementing or strengthening the Union in its position." (Pet. App. 103.)

Where, as here, it has been found as a fact that Hawkins and Hollins interfered with the Union, disrupted the adjustment board proceedings, rendered ineffectual the Union's efforts to correct the alleged discrimination and attempted to *replace* and *supplant* the Union and become the representative of the minority employees of the Emporium, the fact that both the Union and Hawkins had the same *ultimate objective,* does not mean they were not working at cross-purposes. The Union wanted to handle the case one way. Hawkins and Hollins prevented this and attempted to handle it another way. This amounted to working at cross-purposes with the Union.

Likewise, to argue, as respondents and the Union do (Resp. Br. 46, citing Union Br. 21-22), that the Union did not oppose Hawkins and Hollins' activity is absurd.

First: It is not true.

Second: The Union could not legally approve or give Hawkins and Hollins permission to bargain with the employer or to attempt to compel the employer to bargain.

Turning first to the so-called "approval" or endorsement of Hawkins' and Hollins' conduct by the Union, we find that the Union states:

> "To be sure, the employees chose to follow their publicity campaign, *contrary to the desires of Union Representative Johnson,* but *at no time did Johnson denounce their action* or demand that they cease distributing their leaflets." (Union Br. 21.) (Emphasis supplied.)

This was because the Union had a "hot potato" on its hands and felt compelled to handle it very gingerly. Johnson did not "denounce" Hawkins and Hollins because this would not have been politic. The Trial Examiner states as follows:

> "6. The Union vs. the picketing
>
> "In view of what appears to be the General Counsel's position that the Union concurred or at least acquiesced in the picketing activities of the two dischargees, in addition to what has already been noted of the differences expressed between the Union's approach to the processing of grievances with respect to the issue of racial dis-

crimination under the bargaining agreement and that pursued by Hawkins and Hollins, it is noted that W. Griffin, the Union's business agent, testified that Johnson did not advise these employees to picket, but told them it was up to them as individuals, that they could take whatever 'actions they wished,' but he hoped they would follow the union program through arbitration and the Adjustment Board. Griffin further testified that after the picketing started he told Hawkins that they—the picketing employees—*were going the wrong way about it,* that they should 'let the Union handle it.' Johnson testified that he never warned or instructed employees not to engage in activities on their own, but at the September meeting, when some employees exhibited frustration, and it was suggested that the Emporium be picketed, the employees were informed 'that we had a contract, we couldn't participate in any boycotting activities, that individuals could take whatever action they wanted to as long as it was legal,' that 'an individual had a right to take action that a Union could not take.' He advised the employees that if the matter went to arbitration it might take as much as 7 months to get a decision, but, according to him, they wanted something 'dramatic.' 'I informed them,' he testified, 'what an individual wanted to do on their own, they could do, but I wasn't going to engage in any drama, but I *wanted some orderly legal procedures that would have some long lasting effect.*' Johnson further testified that he told the employees that the Union accepted no responsibility for their actions as individuals as long as it was not concerned with the contract. '*We will advise them as to what we thought was the best procedure,*

but it was obvious that our advice didn't carry much weight at the time.' Finally, Johnson testified that about the time the pamphlets were being distributed by those picketing he talked to Hollins, *told him that he did not want to see him fired, and that the only way to resolve the matter was through arbitration.* It was then that Hollins replied that the 'only one' they wanted to talk to was the president of Respondent, Batchelder.

"The Union did file a complaint or protest with the Retailer's Council on the discharge of Hawkins and Hollins, but did not file the charge which initiated this proceeding." (Pet. App. 89-90.) (Emphasis supplied.)

Thus, the argument that the Union "approved" the conduct of Hawkins and Hollins is as ill-founded as the argument that they were not working at cross-purposes. Although the Union did not denounce their acts, it never approved them and it advised Hawkins and Hollins not to act as they were doing.

Secondly, the Union could not legally approve the actions of Hawkins and Hollins for several reasons: First: Hawkins and Hollins were seeking to represent an employee unit different from that covered by the Union agreement. Second: They sought to engage in collective bargaining with the employer. Third: They sought to bargain on one subject only. Fourth: This was during the contract year under a contract which contained a "zipper clause." Nothing the Union did could render the conduct of Hawkins and Hollins protected under these facts.

IV. HAWKINS AND HOLLINS' DISCHARGE DID NOT VIOLATE SECTION 8(a)(1) OF THE LMRA

The Union argues:

> "As a matter of uncontested fact, Hawkins and Hollins *were not discharged for any effort to bargain with the Company.* Rather they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company." (Union Br. 11.) (Emphasis supplied.)

Respondent's brief quotes this with approval. (Resp. Br. 30-31.)

This argument is appropriate in discharge cases in arbitrations under union contracts which require the employer to state the reason for the discharge. Obviously, if the employer in such case failed to state the reason for the discharge, he would lose the arbitration.

There is no such requirement under the LMRA. Section 8(a) (1) of the Act states:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

In order to establish a violation of Section 8(a) (1), it would be necessary to prove that Hawkins and Hollins were discharged for engaging in protected

concerted activities. The acts Hawkins and Hollins engaged in were not protected for the reasons set forth above.

As they were not acting in the exercise of the rights guaranteed in Section 7, the employer did not violate the Act in discharging them. The Act does not require that the employer state the reason for their discharge.

The Union states:

> ". . . with slight exception, the company was *not even aware of any intent to bargain* on the part of Hawkins when they were fired and nearly all the evidence pertaining to this issue was adduced only at the Board hearing—long after the discharges." (Union Br. 11.) (Emphasis added.)

But what was adduced at the Board hearing was testimony concerning what occurred at the adjustment board hearing prior to the discharges including the testimony that Hawkins and Hollins wanted to represent all minority employees employed at the Emporium and to talk to the president to reach an agreement with him. The Emporium obviously was present at such hearing and was well aware of all that had taken place.

It cannot be seriously argued that Hawkins and Hollins would have been fired if the only thing they had done was to go to Batchelder and say: "We would like to bargain with you on behalf of all your minority employees." Batchelder would have told them that the Emporium already had a contract and that

if Hawkins and Hollins considered that racial discrimination existed they had three ways to go:

1. Through the Union arbitration procedures.
2. Through the State F.E.P.C.
3. Through the E.E.O.C.

That was the import of the warning notice.

What brought about their discharge was the totality of their conduct, not their mere request to bargain.[3]

V. DELAYS INVOLVED IN EEOC PROCEEDINGS DO NOT JUSTIFY A MAJOR JUDICIAL ALTERATION OF ESTABLISHED FEDERAL LABOR LAW PRINCIPLES.

Respondent argues that the delays involved in Title VII proceedings justify what took place here. (Resp. Br. 53.) However, respondent is not joined in this argument by the Union, the NAACP, or the Urban League. Nor did the court below rely on administrative delay as one of the grounds for its decision.

If respondent's argument is valid, then every minority employee or group of employees in the country would be protected in picketing their employer to compel him to bargain with them whenever they have a good faith belief that racial discrimination exists. This could include several minority groups picketing the employer simultaneously.

---

[3]On the subject of disloyalty, we agree with the arguments made in the able brief of the National Retail Merchants Association but will not repeat them here.

The short answer to this argument is that if there is something defective in the EEOC procedures, the remedy is to correct the EEOC procedures, not to set up other procedures in conflict with other federal laws.

VI. FURTHER REASONS COMPELLING REVERSAL OF THE COURT BELOW

We strive not to add to the burdens of this Court by duplicating the able and excellent arguments in the briefs on behalf of the National Labor Relations Board and of *amici curiae* in support thereof. We feel it our duty to say, however, that as long as the language of the court of appeals' opinion stands uncorrected by this Court neither employers nor unions throughout the country will know with any certainty what rules apply where minority employees claim employer discrimination.

A. There is no authority for and no machinery for determining a minority bargaining unit.

The court below relied in part on the following reasoning:

> "There was *no disruption of orderly collective bargaining* in the sense that a minority of employees *were not attempting to speak for the majority* as in the case where a minority group engages in a 'wildcat' strike during company-union negotiations in an attempt to express a rejection of a company offer." (Pet. App. 26.) (Emphasis supplied.)

Later, the court said:

> "The union declined to change its pending complaint to proceed on a 'group' basis. At this point, petitioners abandoned the pending grievance procedure which had been initiated on their behalf and *engaged in concerted activity allegedly on behalf of all minority employees.*" (Pet. App. 26.) (Emphasis supplied.)

These statements, rather than helping the Court's opinion, make it even worse.

Here we have a new unit injected into the picture. It is not one agreed upon by the employer and the union or approved by the Board but is one selected by Hawkins and Hollins. Thus, the court asked the employer to recognize a unit different from that agreed upon with the Union and approved by the Board.

Section 9(b) of the LMRA states that the Board

> "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

It does not provide for a racial unit or for a minority unit. Thus, there is no legal machinery for determining whether or not the unit suggested by the court is appropriate. Moreover, it was not for the purpose of collective bargaining but solely for the purpose of bargaining on one subject, namely racial discrimination. There is no authority in law for such suggestion.

B. No machinery exists for determining representatives of minority bargaining unit.

The Trial Examiner stated:

> "Apparently, they were *self-appointed* for there is no evidence that they were elected or in any way designated by minority employees generally to represent them, they alone walked out of the September 3 meeting, and it does not appear that they were joined in their picketing activities by other Emporium employees." (Pet. App. 101-102.) (Emphasis supplied.)

There is no way in which the employer could safely determine who Hawkins and Hollins actually represented. To require the employer to bargain under such circumstances would result in serious injustice.

C. Settling disputes by the two different simultaneous procedures will not work.

This brings us to the incredible statement of the court: "We cannot agree that any inconvenience which the company might experience in being required to bargain with the minority while still participating in the grievance procedures justifies withdrawing Section 7 protection from these concerted activities." (Pet. App. 29.)

Thus even if the Union failed in its duty to represent the minorities, the court below required the employer to participate with the Union in the grievance procedures involving the minority employees.

No explanation is given as to how the employer could do this in view of the fact that Hawkins and Hollins prevented the Union from proceeding by walking out of the hearing.

Furthermore, as Judge Wyzanski pointed out, there could be no settlement with Hawkins and Hollins for the benefit of the minority employees that did not adversely affect the majority employees in the unit. (Pet. App. 44.)

Respondent points out that Hawkins and Hollins wanted action, not words: "The collective bargaining agreement created contract rights; Hawkins and Hollins attempted to achieve realization of these rights for minorities." If the employer acceded to the demands of Hawkins and Hollins it might well be liable for the type of reverse discrimination alleged in *De Funis v. Odengaard,* 40 LEd2d 164 (1964). Furthermore, special concessions to minority employees by an innocent employer would be in violation of the contractual rights of the majority employees under the employer's labor agreement with the Union. Thus, instead of settling anything, the employer would have twice as many problems as before including possible legal liability.

We do not believe that Congress intended to present an innocent employer with the alternative of making settlement with Hawkins and Hollins or continuing to suffer their picketing and boycotting activities, particularly when this unhappy predicament is not the result of anything the employer has done but results solely from the failure of the Union to do its job according to the standard set by the Court of Appeals in this case.

D. Union action was subject to contract bar.

Finally, the court completely overlooked the fact that bargaining was foreclosed because of the existence of valid labor agreement with a "zipper clause" by which the parties expressly agreed not to re-open for bargaining for any reason during the life of the contract. The Board has held that the parties may lawfully agree to waive their right to bargain during the contract term. (See discussion of "zipper clauses" in Morris, *The Developing Labor Law,* Section of Labor Relations Law, ABA, 1971, p. 470).

This is not merely a case where an employer refuses to discuss racial discrimination solely because the request is made during the contract term. Rather it is a case where the parties have bargained on the subject and have agreed that any problems involving discrimination arising during the term of the contract shall be handled through arbitration. To suggest that the Union bargain during the life of a contract on a subject already agreed upon is to make contracts meaningless where minority employees claim discrimination.

E. Hawkins and Hollins' interference with the Union was not a limited interference.

After declaring that Hawkins and Hollins rendered essentially ineffective the Union's efforts to correct alleged radical discrimination, the Court said:

> "We cannot agree with the Board, however, that this *limited interference alone* is sufficient to remove those concerted activities from the protec-

tion of the Act." (Pet. App. 24.) (Emphasis supplied.)

Hawkins and Hollins' interference with the Union was not a merely limited one.

None of the cases discussed by the court below or cited in the many briefs, such as *N.L.R.B. v. R. C. Can Co.*, 328 F.2d 974, *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216, *N.L.R.B. v. Shop Rite Foods, Inc.*, 430 F.2d 786, and *Lee A. Consaul Co.*, 175 NLRB 547, *rev'd per curiam*, 469 F.2d 84, involved a direct attempt by employees to supplant and displace the union recognized by the employer and to substitute themselves as the bargaining representative of the employee as was done in this case. This is a substantially greater interference with the Union than a wildcat strike to protest the Union's delay or to protest the Union's plan of action.

Hawkins and Hollins prevented the Union from acting just as surely as if they had physically prevented the Union representatives from attending the adjustment board hearing. If this conduct did not remove the protection of the Act, we cannot imagine what would.

CONCLUSION

We respectfully submit that the court below violated the admonition of this Court in *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, by effectuating the policies of Title VII so single-mindedly as to ignore other and equally important Congressional objectives.

If it were necessary to protect the conduct of Hawkins and Hollins in order to effectuate the policies of Title VII there might be a basis for the court's decision. That it was not necessary is amply demonstrated by the remedies provided under the Union contract, under the state law and under the federal law.

Dated, October 1974.

Respectfully submitted,

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Supreme Court, U. S.
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BRIEF OF THE NATIONAL URBAN LEAGUE AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CONSENT TO FILING

This *amicus curiae* brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF *AMICI CURIAE*

National Urban League. The National Urban League is a professional community service organization consisting of 102 affiliates around the country, five regional offices, and a Washington bureau. The League, which is nonpartisan and interracial in its leadership and staff, is committed to securing equal opportunities for blacks and other minorities in all areas of American life. The League has been particularly concerned with the eradication of discrimination in employment and believes that the outcome of this case is important to its efforts to aid minority employees in the eradication of on-the-job discrimination.

Southern Christian Leadership Conference. The Southern Christian Leadership Conference is an eleemosynary organization dedicated to improving the civic, religious, economic, and cultural conditions of black people throughout the United States. The SCLC has consistently attempted to improve the economic position of minorities by aiding in the eradication of employment discrimination and believes that this Court's decision in the present case will have a significant effect on the continuing ability of minority workers to protect their rights to nondiscrimination in employment.

QUESTION PRESENTED

Whether peaceful leafleting by two black employees, on their own time, protesting their employer's racially discriminatory policies, loses its status as a protected "concerted activity" under Section 7 of the National Labor Relations Act, so as to justify their discharge, because the object of the leafleting was for the two employees to discuss with the employer's president their allegations of

racial discrimination—allegations which were cognizable under Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

A. *Factual Background*

In view of the contentions of the petitioners and of the *amici* supporting them, we believe it important to set out the relevant factual background of the case in some detail. The Emporium Capwell Company (the "Emporium"), one of the petitioners herein, operates a department store in San Francisco. Despite the passage of Title VII of the Civil Rights Act of 1964, the Emporium's record as an equal opportunity employer has been entirely unimpressive.

According to 1970 census data, the population of the San Francisco metropolitan area is 28.9% minority, including 10.6% blacks, 0.4% American Indians, 5.3% Asian-Americans, and 11.7% Spanish-surnamed Americans.[1] By 1968, the Emporium had 6,179 employees of whom 835 (13.5%) were members of minority groups. The minority employees consisted of 283 blacks (4.6%), one American Indian (less than 0.1%), 195 persons of Asian descent (3.2%) and 352 Spanish-surnamed Americans (5.7%). Of the 1,231 managerial, professional, and technical employees of Emporium, a mere 72 (5.9%) were members of minority groups. Of the 2,898 sales personnel, only 286 (9.9%) were members of minority groups. (A. 120)[2] Furthermore, it appears that the minority sales personnel were as a matter

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[1] Department of Commerce, Bureau of the Census, 1970 Census of Population, Characteristics of the Population, California 6-102 (1973); Office of Research, EEOC, Employment Profiles of Minorities and Women in the SMSAs of 17 Large Cities, 1971, pp. 89, 92 (June 1973).

[2] "A" refers to the Appendix filed in this Court.

of course assigned to the less desirable departments. Thus, the record shows that there were no minority sales personnel in the rug department, the high fidelity department, the television department, the kitchen appliance department, the furniture department, the fur department, the better women's coats department, the maternity clothes department, the wedding gown and formal clothing department, and the women's suit department—all of which paid relatively high commissions. (A. 116-17)

On December 29, 1967, Department Store Employees' Union Local 1100 signed a union shop collective bargaining agreement with the San Francisco Retailers' Council, a multiemployer bargaining unit of which the Emporium is a member.[3] (A. 99) Section 21E of that collective bargaining agreement provides that

> "No person shall be discriminated against in regard to hire, tenure of employment, job status by reason of race, color, creed, national origin, age or sex." (A. 101)

Sections 36B-F of the agreement provide an elaborate means of resolving "all complaints and disputes arising" from the agreement. These sections provide for an Adjustment Board consisting of three union and three management representatives and further provide that where the Adjustment Board is unable to resolve a dispute in seven days, either party may request the matter to be submitted to an impartial arbitrator whose decision "shall be accepted as final and binding." (A. 101-03)

Despite the nondiscriminatory generalities of the collective bargaining agreement, the pattern of racial discrimination on the part of the Emporium described above persisted. In the spring of 1968, a number of minority employees at the Emporium, including Hawkins and Hollins —whose firing precipitated the present litigation—began to accumulate specific evidence of the Emporium's racially discriminatory personnel practices.

[3] The agreement, which is reproduced in relevant part at A. 99-103, appears to be dated December 29, 1967, but provides that it "shall be effective from June 1, 1967." (A. 99, 103)

In a series of meetings in the spring of 1968, the employees turned over much of the evidence they had collected to the union and requested that the union take action to eliminate discriminatory practices. (P.A. 33-34)[4] The first such meeting took place on April 3, 1968. Mr. Walter Johnson, the chief executive officer of the local union, testified that

> "it was the general consensus of the opinion . . . of those present that there were less opportunities for those who were in the minority race, not only Negroes, but we had Filipinos and all different groups represented.
>
> "Among the grievances mentioned were the facts that they had probably not proper treatment from the supervisors and also not the opportunity for promotion." (A. 73)

Mr. Johnson's report on the meeting contains the following language about the race discrimination problems:

> "Probably the most important matter raised was a possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination does exist and that this discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age.

[4] "P.A." refers to the Appendix to the Certiorari Petition filed by the Emporium.

> "It was further mentioned by the Stewards and the Committee that most of the minority people were disgusted and were looking for other jobs. They feel that they are entitled to more than a job; that they should have the same opportunity to advance as other employees do." (A. 111-12)

After the April meeting, Mr. Johnson met with the Retailers Council and with the Emporium. In addition to the general allegations of racial discrimination, matters discussed covered specific instances of discrimination involving the failure to promote blacks to supervisory positions. The Emporium's labor relations manager agreed that "the store would look into it and then see what they could do to alleviate the circumstances." (A. 74, P.A. 4, 82)

In May 1968 a group of ten employees, expressing their continued concern about the racial situation, met with Johnson. According to Johnson, "there was some delay in there and finally in September" still a third meeting was held between union officials and minority employees to discuss the problem of the racially discriminatory policies of the Emporium. (A. 74)

At the September 3 meeting, Johnson announced that the union had considered the problem and concluded that the Emporium had been acting discriminatorily. (A. 74-75) Johnson stated that the union would demand an Adjustment Board meeting and would insist upon arbitration if necessary. Johnson acknowledged that arbitration "is going to take a long time" but stated that such arbitration would "have some lasting effect." (A. 75-76) As of this time, it was the union's "official position" that there was unlawful racial discrimination at the Emporium. (A. 78)

On September 4, 1968, the day after the meeting, Johnson wrote to the Retailers Council to request a meeting of the

Adjustment Board and arbitration to resolve "specific" charges of racial discrimination. (A. 80, 119) As a result, on October 16, 1968, more than six months after the charges of racial discrimination were first brought to the union's attention, a meeting of the Adjustment Board was held to consider a number of allegations of discrimination by the Emporium against specific individuals. (A. 75)

The minority employees involved believed that such a procedure would result only in a few token promotions and would leave untouched the basic problem—the Emporium's policy of discriminating against minorities as a class in hiring and promotion. In their view, a real solution to the problems of discrimination could only come about if the Emporium reexamined its overall personnel policies with respect to minorities as a class.[5] As a result, at the meeting, Hollins, speaking for himself and three other black employees

> "made a statement that we were not going to speak at this meeting as individuals, we were speaking as a group and our main purpose was to talk to the President [of the Emporium] to try to reach an agreement with him to straighten out the problem and conditions of The Emporium." (A. 35)

The four employees thereupon left the meeting and refused to participate in the union's processing of their grievances. A second meeting of the Adjustment Board was held two days later. The record does not indicate what trans-

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[5] Hawkins' and Hollins' insistence in this regard was hardly unreasonable. Courts have uniformly held that racial discrimination necessarily affects minorities as a class and that, accordingly, class-wide remedies are required to eliminate such discrimination. *See, e.g., Georgia Power Co.* v. ***EEOC***, 412 F.2d 462, 468 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

pired at that meeting, but none of the four employees attended.

At approximately this time, Hollins went to see the president of the Emporium and asked to talk to him "about a situation that [he] felt should be discussed about things that were happening among minority employees at the store." (A. 65) The company president refused to speak with Hollins, but suggested that he discuss his problems with the personnel manager. Hollins declined to do so, having previously spoken to the personnel manager to no avail. (A. 65, P.A. 8)

On October 22, 1968, Hollins and Hawkins, together with several other employees, held a press conference. Hollins explained that the group was

> "planning on leafleting and boycotting the store because we felt that employees were not being treated fairly, minority employees were not being treated fairly as far as working conditions was [*sic*] concerned." (A. 48)

On Saturday, November 2, on their own time, Hollins and Hawkins and two other employees distributed a handbill to people entering and leaving the store. While their conduct has subsequently been described as "picketing" (see, *e.g.*, NLRB Br. 38), the record indicates that they did not carry signs or engage in any effort to induce employees not to enter the premises. Rather, their activities were at customer entrances and consisted of passing out copies of a handbill which urged minority group members not to shop at the Emporium. (A. 46-47)

The language of the handbill is not entirely temperate. However, even if they could be judicially cognizable, issues as to its literary quality or temperateness are not before this Court, since the administrative decision in this case, as

will be developed below, was based entirely on the *objective* of Hollins and Hawkins in passing out the handbills. The handbill stated that the Emporium had been discriminating against minorities for years by relegating them to the lowest paid jobs and refusing to promote them. The handbill called upon all minorities "to take their money out of this racist store" until minorities were given full equal employment opportunities. A copy of the handbill appears at A. 105 and P.A. 9. The record is clear, and the handbill itself indicates, that at no time did the employees disparage the quality of the Emporium's merchandise or make any contentions with respect to the Emporium's policies except as to racial discrimination in hiring and promotion. There is no suggestion in the record of any physical obstruction of the premises by the leafleters.

On November 7, Hawkins and Hollins were called to the office of the personnel manager and given a written "warning" to refrain from leafleting or making any other public statements as to racial discrimination by the Emporium. (A. 49-50) A copy of the warning appears in the note below.[6] Notwithstanding the warning, Hollins and Hawkins, again on their own time, passed out similar leaflets protesting the Emporium's racial policies on the next Saturday, November 9, 1968. (A. 50, 107) The following Monday, both were fired. Their discharge slips stated:

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[6] "On November 2, 1968, you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

"These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

"There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

"This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement." (A. 106)

"You are being discharged today. Distribution of 'Boycott Emporium' literature on November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68." (P.A. 10, 40)

B. *The Proceedings Below*

As a result of the firing, a charge was filed with the National Labor Relations Board ("Board") alleging that the Emporium violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by terminating Hollins and Hawkins for engaging in protected concerted activity within the meaning of Section 7 of the NLRA.[7] The Trial Examiner found that Hollins and Hawkins had indeed engaged in concerted activity within the meaning of Section 7 of the NLRA[8] and that this activity had been based upon a good faith belief that the Emporium was discriminating against racial minorities. (P.A. 94-97) However, the Examiner focused on the objective of the leafleting and, although the record was somewhat conflicting, found that the objective of Hawkins and Hollins was to attempt to bargain with the Emporium as to its minority hiring and promotion practices. (A. 103-04) That attempt, the Examiner concluded, was "inconsistent with and disruptive of" the procedures for settling grievances under the collective bargaining agreement. Thus the Examiner held that the leafleting lost its Section 7 protection because of its objectives:

[7] In addition, the union filed a grievance charging that the firings were in violation of the collective bargaining agreement. (P.A. 40)

[8] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in . . . [Section 8(a)(3)]." 29 U.S.C. § 157.

"[T]o extend the protection of the [National Labor Relations] Act to the two employees named in the Complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement." (P.A. 104-05)

In reaching this result, the Examiner refused to consider Title VII of the Civil Rights Act of 1964 and its effect on union-minority relations, or even the NLRA's own antidiscrimination policies, because he "noted" that the Board does "not belong in the contemporary civil rights struggle." (P.A. 101) The Board, in a three-to-two vote, summarily affirmed the Trial Examiner's finding without opinion. (P.A. 56)

The court below unanimously reversed the Board's decision on the ground that both the Trial Examiner and the Board majority completely ignored the policies of the Civil Rights Act. The two-member majority of the court noted that concerted activity protesting racial discrimination has a unique protected status under Section 704(a) of Title VII of the Civil Rights Act of 1964.[9] For that

[9] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a).

reason, the court held that such concerted activity—even if it did amount to attempting to "bargain" with the employer—should not lightly be held to lose the protection of Section 7 of the NLRA. (P.A. 19-22)

The court, tracing through the background of the case, found that the two minority employees involved attempted for a reasonable period of time to work through the union grievance procedure and found, in addition, that the minority employees and the union local were not working at cross purposes. (P.A. 24-26) Furthermore, the court found that the minorities' conduct could not significantly interfere with the union's position as a collective-bargaining representative because the union was required by Title VII, as well as by its collective-bargaining agreement, to eradicate employment discrimination. (P.A. 23) The court held that under these circumstances, the interaction of the NLRA and Title VII required the protection of concerted minority action protesting racial discrimination independent of the union unless the union was actually remedying the situation "to the *fullest extent possible by the most expedient and efficacious means.*" (P.A. 28) (emphasis original) Since no evidence had been adduced in that respect, the court remanded the case to the Board for further proceedings.

The third member of the court, while agreeing that reversal of the Board's decision was required, believed that Title VII of the Civil Rights Act of 1964 provides employees an absolute right to be free of racial discrimination in employment. Furthermore, this right belongs to the minority group members involved, not to the union. Thus, no union may bargain away this right, whatever the union's good faith, and whatever the desires of the majority of the union's members. (P.A. 45-46) As a result, that judge concluded that minority employees are entitled to treat on their own with the employer as to issues of racial discrimination and that their concerted activity herein was therefore protected under Section 7 of the NLRA. Indeed, in his view, any contrary holding which put the processes of the Board behind a majority-white union's handling of black employees' rights to nondiscrimination against the black employees' expressed desires and forbade the black employees to speak for themselves on racial issues would render the NLRA unconstitutional as so applied. (P.A. 42, 51) Accordingly, the third judge would have required the reinstatement of the two employees without a remand.

SUMMARY OF ARGUMENT

I. It is undisputed that Hawkins' and Hollins' actions at issue constituted concerted activity of the sort which is normally protected by Section 7 of the NLRA. Indeed, the the Trial Examiner and the Board majority, in adopting the Examiner's opinion, so held. (P.A. 94) However, the petitioners claim that, by attempting to negotiate with their employer as to issues of racial discrimination,[10] Hawkins and Hollins interfered with the union's exclusive right under Section 9(a) of the NLRA to enter into and enforce a collective-bargaining agreement and thereby forfeited their Section 7 protection.

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[10] We assume, along with the Court of Appeals, that Hawkins and Hollins were discharged for attempting to bargain with the Emporium over issues of racial discrimination. However, as the statement of the case above indicates, and as the *amicus* brief of Department Store Employees Union, Local 1100, argues, a persuasive case can be made that Hawkins and Hollins were discharged solely because they made public statements and distributed leaflets contending that the Emporium was discriminating. Such activity is plainly protected. *NLRB* v. *Magnavox Co.*, —— U.S. ——, 94 S. Ct. 1099 (1974); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938). *See* the discussion, page 34, *infra*.

The petitioners' argument collapses because it ignores the interrelationship of Title VII of the Civil Rights Act of 1964 and the NLRA. Title VII gives minority employees an individual and absolute statutory right to sue—and, necessarily, to attempt to negotiate a settlement with—their employer on racial discrimination issues without dealing through the union. The employee's right to seek a settlement obviously includes the right to seek to meet with his employer. And, in view of Title VII's strong policy in favor of voluntary resolution of disputes, that right extends to attempts to resolve racial discrimination complaints prior to the institution of formal Title VII proceedings. Hawkins' and Hollins' attempt to meet with their employer was thus specifically authorized by Title VII. The exercise of Title VII rights is protected by Section 7 of the NLRA.

II. With the case seen in this perspective, the various arguments tendered by petitioners and the *amici curiae* supporting them fall of their own weight. To be sure, if the Emporium were to bargain with Hawkins and Hollins, this could theoretically derogate from the principle of exclusivity and in theory be disruptive of the processes of bargaining exclusively between the union and the management—although as a practical matter those fears are scarcely warranted on the present record. But where Title VII rights are involved, the union's "exclusivity" is limited in any case. Individual employees are empowered under Title VII to sue, and to negotiate a settlement of such a suit. The result of such a suit or settlement is likely to be much more disruptive of management's "one-on-one" bargaining with the union or of the principle of exclusivity than whatever proposal Hawkins and Hollins would have made to the Emporium's president had they ever been allowed to talk to him. The fact of the matter is that by

providing private rights to individual employees under Title VII of the Civil Rights Act outside the formal sphere of exclusive bargaining between union and management, Congress has made nonexclusive the union's role in the field of racial discrimination. In so doing, Congress has made a choice to subordinate the values inherent in the exclusivity principle to strong enforcement of the policy against racial discrimination which it thought more important.

ARGUMENT

I. Concerted Activity by Minority Employees to Redress Alleged Racial Discrimination Is Both Authorized by Title VII of the Civil Rights Act and Protected under the National Labor Relations Act

The precise issue of this case is whether under the NLRA, read in conjunction with Title VII of the Civil Rights Act of 1964, the Emporium was justified in firing Hawkins and Hollins because they handed out leaflets publicizing a grievance they had with their employer. The leafleting was performed entirely on their own time and on public property, and did not involve any obstruction of access to the employer's premises. Although Hawkins' and Hollins' leafleting is a classically protected form of concerted activity, their conduct was held unprotected by the Trial Examiner and the Board because of its objective. That objective was, the Trial Examiner and the Board held, Hawkins' and Hollins' efforts to meet with the management of the Emporium in an effort to resolve their charges of racial discrimination.

But, as the discussion below demonstrates, Hawkins' and Hollins' objective was not only lawful—it was specifically authorized by Title VII. The exercise of Title VII

rights is protected activity within the coverage of Section 7 of the NLRA. Accordingly, the firing of Hawkins and Hollins is prohibited under the NLRA.

A. *Hawkins and Hollins Were Entitled to Proceed under the Collective Bargaining Agreement, or under Title VII, or Both, Without Regard to the Union's Views*

This Court's recent decision in *Alexander* v. *Gardner-Denver Co.*, 94 S. Ct. 1011 (1974), makes it clear that where, as in the present case, there are "parallel" or "overlapping" rights against racial discrimination—one right contained in the union collective-bargaining agreement, and the other in Title VII—minority employees are entitled to exercise either or both of those rights at their option.

In *Alexander*, the black plaintiff was discharged for reasons he believed to be racially related. Alexander and his fellow employees were represented by a local union and the operative collective-bargaining agreement contained an antidiscrimination provision and a broad arbitration clause requiring the submission of all disputes to a grievance procedure culminating in arbitration. The collective-bargaining agreement provided that the decision of the arbitrator would be final and binding. 94 S. Ct., at 1015-16. The collective-bargaining agreement before the court in *Alexander* was thus virtually identical to that in force between the Emporium and the union in the present case.

Alexander filed a grievance which was processed through arbitration; the arbitrator found for the company. In the meantime, Alexander had filed a Title VII lawsuit. The lower courts dismissed Alexander's Title VII suit on the ground that Alexander was bound by the arbitrator's decision under the collective-bargaining agreement. This Court unanimously reversed:

> "[L]egislative enactments in . . . [the area of equal employment opportunity] have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. . . . Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. . . .
>
> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both [the Title VII and collective-bargaining agreement nondiscrimination] rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude . . . [enforcement of the statutory rights]." 94 S. Ct., at 1019-20.

Moreover, the Court held in *Alexander* that an employee's right to proceed under Title VII is "absolute." That is, an employee is free to pursue his or her Title VII rights without consultation with the bargaining representative,

or even against the direct desires of the bargaining representative:

> "Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights are not susceptible to prospective waiver [by the union]." 94 S. Ct., at 1021.

The reasoning of *Alexander* in this regard is particularly persuasive when it is recalled that Title VII was enacted in order to end the control of minority rights by union majorities:

> "A further concern [which prevents a holding requiring adherence to union procedures] is the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers." 94 S. Ct., at 1024-25, n. 19.

Thus, Hawkins and Hollins were free to ignore their rights under the collective-bargaining agreement and exercise their rights under Title VII or vice versa. They were also free to proceed under both Title VII and the collective-bargaining agreement either in sequence or simultaneously. And the decision in this regard was theirs alone.

B. *Hawkins and Hollins Were Fired for Exercising Their Title VII Rights in Seeking to Meet with Their Employer*

Alexander holds, and petitioners concede, that Hawkins and Hollins—or any other minority group member—had the right to file Title VII charges with the Equal Employment Opportunity Commission ("EEOC") and then file a lawsuit,[11] whatever the union's views and notwithstanding the union's position as bargaining agent. NLRB Br. 27-28. *See* 42 U.S.C. § 2000e-5(a) *et seq.* Where minority employees or potential employees prevail in a Title VII lawsuit, they are entitled to whatever relief is necessary to end the discrimination and eradicate its consequences. That relief often affects labor-management relations in a broad fashion. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (elimination of testing procedures); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971) (restructuring of seniority system); *Sims* v. *Sheet Metal Workers Int'l Ass'n, Local 65*, 489 F.2d 1023 (6th Cir. 1973) (establishment of affirmative action program); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972) (imposition of a temporary quota hiring system). The availability of such relief, of course, is in no way dependent upon the views of

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[11] Title VII provides for the following procedures: Where an individual believes that he or she has been the subject of unlawful discrimination, a charge may be filed with the EEOC. The EEOC investigates and, if it finds reasonable cause to believe the charge is true, attempts to conciliate the charge by reaching an accommodation satisfactory to both the employer and the employee. When the EEOC is not able to successfully conciliate the charge within 180 days of its filing, it may issue a "right to sue" letter. At this juncture, or at such time as the EEOC dismisses a charge, the charging party is entitled to file suit in a federal district court. Since the rights involved belong to the individual charging party, the charging party has control over any litigation he or she may bring as well as a right to intervene in any litigation brought on his or her behalf by the EEOC. 42 U.S.C. § 2000e-5(a) *et seq.*

the union or the provisions of the collective bargaining agreement—no matter what effect it might have on that agreement.

Hawkins' and Hollins' right to file a Title VII charge or suit on their own necessarily carries with it the right to settle on their own as well. *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973). Indeed, it is normal procedure in our judicial system for parties to attempt to resolve their differences either during or prior to litigation. Title VII is particularly clear in this regard, since "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [equal employment opportunity under Title VII]." *Alexander* v. *Gardner-Denver Co., supra,* 94 S. Ct., at 1017. *See also Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) ("there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation"); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).

The right to settle their Title VII claims plainly protects Hawkins' and Hollins' right to request their employer to meet with them and to negotiate with them if so inclined. Settlements can hardly occur without discussions between the parties. In fact, Title VII complaints are often, perhaps mostly, settled by negotiations between the employer and the complaining employees. Where negotiations are successful, they can provide Title VII remedies and vindicate Title VII rights just as completely as a successful lawsuit. Such negotiations can take place between the parties concerned prior to the employees' institution of formal proceedings; through conciliation sponsored by the EEOC after charges have been filed but before the initiation of a lawsuit; or between the employer and employees or their

representatives after a Title VII lawsuit has been filed. All such negotiations are protected by Title VII.[12]

Thus, Title VII provides minority employees with the individual and absolute right, without the concurrence of their bargaining agent, to file charges and lawsuits to eliminate racial discrimination, and to seek to meet with their employer or his representatives to settle such disputes either after or prior to their commencement of formal proceedings. That, of course, is precisely what Hawkins and Hollins did, and, according to the Board, precisely why they were fired.

C. *Hawkins' and Hollins' Concerted Activity in the Exercise of Their Title VII Rights Is Protected by the National Labor Relations Act*

As we have seen, Hawkins' and Hollins' activity in seeking to meet with their employer to eradicate racially discriminating practices was an exercise of rights specifically guaranteed by Title VII of the Civil Rights Act of 1964. Discharge of employees for exercising their Title VII rights is unlawful under Section 704(a) of Title VII.[13] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

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[12] There is no distinction in this regard between a minority employee's right to settle his Title VII claims before or after he institutes a formal proceeding or lawsuit. Requiring minorities to initiate formal proceedings before settling would cause the filing of needless charges and lawsuits; add to the workload of the already overburdened EEOC and federal courts; replace informal and inexpensive contacts between employer and employee with the more formal and more expensive contacts arising once lawyers are hired and litigation is started; and create new procedural obstacles and time delays for victims of racial discrimination in employment. Such a result is plainly contrary to the policy of Title VII. *Alexander* v. *Gardner-Denver Co., supra.*

[13] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. § 2000e-3(a).

The Trial Examiner and the Board refused to consider the effect of Title VII in determining whether the NLRA protected the concerted activity of Hawkins and Hollins. Indeed, washing his and the Board's hands of consideration of such issues, the Trial Examiner specifically stated:

> "(Parenthetically, it is noted that as adjudicator under the [National Labor Relations] Act we do not belong in the contemporary civil rights struggle. Congress did not put us there.)" (parentheses original) (P.A. 101)

The Board committed plain error in failing to consider Title VII. As this Court held not long after the NLRA's passage, in *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942):

> "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task." 316 U.S., at 47.

In *Southern Steamship*, the Board attempted to extend the NLRA's protection to concerted activity specifically prohibited by another statute. *Cf. MacDonnell Douglas Corp.* v. *Green, supra.* Here the Board would interpret Section 9(a) of the NLRA to render unprotected conduct specifically protected by Title VII. But the lesson of *Southern Steamship* is the same in both instances.

Accommodating the policies of Title VII and of the National Labor Relations Act with respect to the protection of minority rights is hardly a difficult task, for both statutes give special protection to minorities. Thus, the NLRA imposes a duty of fair representation upon collective bargaining representatives. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). Furthermore, the Act makes it an unfair labor practice for an employer to engage in racial discrimination. *United Packinghouse Workers Int'l Union* v. *NLRB,* 416 F.2d 1126 (D.C. Cir.), *cert. denied,* 396 U.S. 903 (1969). Moreover, even apart from Title VII, when an employee has a reasonable belief that the union is not processing or will not process his racial discrimination grievances properly, he or she may ignore the collective bargaining agreement's procedures and proceed directly against the employer on contractual grounds. *See Glover* v. *St. Louis-S.F.R. Co.,* 393 U.S. 324 (1969).

In the present case, the precise issue is whether Section 7 of the NLRA protects attempts by minority employees to meet with their employer to discuss matters cognizable in a proceeding under Title VII of the Civil Rights Act. We submit that a proper accommodation of Title VII and the NLRA requires that Sections 7 and 9(a) of the NLRA be interpreted to protect such activity. Any other interpretation of the NLRA attributes to Congress the irrationality of establishing a system of protection for minorities under which the NLRA would permit an employer to fire an employee for exercising his Title VII rights. Of course, the employee could later recover damages in a Title VII suit. But the immediate disadvantage of loss of employment would seriously diminish the value of Title VII rights and discourage attempts by employees to settle Title VII claims without litigation.

Such a result runs directly contrary to both statutes' policies of promoting voluntary resolution of disputes and of providing strong protection for the interest of racial minorities. As was pointed out in the legislative history

of the Civil Rights Act, there may well be employee activities which are protected under both Title VII and the NLRA.[14] The latter contains a general protection in Section 7 for concerted activities, which has historically been applied to peaceful leafleting on employees' own time such as was involved here. Since the objectives of the leafleting were to accomplish goals which could be accomplished under the Civil Rights Act, and which may be pursued by employees regardless of their representation by a union, those objectives cannot be said to violate the NLRA.

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For the foregoing reasons, Hawkins' and Hollins' actions in the exercise of their Title VII rights to seek to resolve racial discrimination complaints are protected concerted activity within Section 7 of the NLRA. Accordingly, their discharge constituted an unfair labor practice under Section 8(a)(1) of the NLRA and they must be reinstated.

II. The Arguments Raised by Petitioners and the *Amici* Supporting Them Are Wholly Without Merit

Petitioners and the *amici curiae* who support them—the combination of the U.S. Chamber of Commerce and the AFL-CIO—raise various arguments in asserting that the objectives of Hawkins' and Hollins' leafleting forfeited the protection of Section 7 of the NLRA. Those arguments simply do not consider the Civil Rights Act of 1964. They

[14] "If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." (Justice Department Memorandum inserted in record by Sen. Clark.) Legislative History of Titles VII and XI of Civil Rights Act of 1964 (EEOC ed.) p. 3244. See also Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1400 (1972) (Remarks of Sen. Javits).

ignore the fact that the remedies under Title VII may be pursued by individual employees without reference to their collective bargaining agreements and that such rights are individual, plenary and statutory. The pursuit of such rights, whether by litigation or attempted negotiation, can hardly be said to be an unlawful objective. We will deal *seriatim* with these arguments:

1. *"Derogation from Exclusivity."* It is first contended that the protection of Title VII rights under Section 7 of the National Labor Relations Act will derogate from the certified union's role as exclusive spokesman for all employees under Section 9(a) of the Act. NLRB Br. 17-26; AFL-CIO Br. 4-8. This argument fails to take account of the distinction between the union's role with respect to most terms and conditions of employment and its role with respect to those terms and conditions protected by Title VII.

The scope of a union's exclusivity under Section 9(a) of the NLRA is narrowed in instances where there are specific statutory rights reserved to individual employees. *NLRB* v. *Magnavox Co.*, 94 S. Ct. 1099 (1974) (employees entitled to exercise statutory right to distribute literature notwithstanding prohibition of such distribution by collective bargaining agreement); *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971) (employee entitled to exercise statutory right to sue in wage dispute despite mandatory arbitration proceeding requirement in collective bargaining agreement). Thus, the broad requirements of Section 9(a) cannot preclude the exercise of specific individual statutory rights, and must yield to them. *See Laborer's Int'l Union, Local 478* v. *NLRB*, BNA DLR No. 140, p. A-6 (D.C. Cir., No. 73-1819, July 10, 1974).

Alexander v. *Gardner-Denver Co., supra,* held that under Title VII the right to racial nondiscrimination in employ-

ment is a right vested in the individual employees and not subject to the NLRA's usual requirement of majority control through the bargaining agent. As a result, a union's decisions on a racial discrimination issue cannot bind minority employees. Rather, Title VII specifically authorizes minority employees to undertake the vindication of their rights themselves. 94 S. Ct., at 1021.[15] Thus, with respect to conditions of employment involving race, the union is simply not the sole spokesman for minority employees and that result is perfectly consistent with the well-established interpretation of Section 9(a).

2. "*Minority Negotiations Might Be Divisive.*" It is next claimed that as a practical matter allowing minority employees to discuss racial discrimination claims with the employer might well have a divisive effect on the bargaining unit. NLRB Br. 20-26. This danger exists, according to the Board, because the union "may disagree" as to the existence of racial discrimination. NLRB Br. 21. Furthermore, even if the union agreed that racial discrimination existed, solutions negotiated between the employer and the minority employees "would be likely to differ . . . from the particular solutions which the majority representative would advocate." NLRB Br. 23. This would prevent "the bargaining unit from maintaining a united front in its negotiation with management . . . ." NLRB Br. 21.

All of these arguments are plainly irrelevant. The union may well disagree with minority workers as to the existence of discrimination, or as to the proper solutions

[15] Compare *Air Line Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc., supra*:

> "Title VII . . . does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged." 490 F.2d, at 641.

therefor.[16] Indeed, the union may be discriminating itself. That is why minorities are entitled to exercise their rights under Title VII whatever the union's view and even against the express desires of the union.[17] These rights clearly include the bringing of charges before the EEOC or the filing of a suit by the employees under Title VII of the Civil Rights Act—steps which are at least as "divisive" as the attempted minority contacts with the employer involved here. The court decree ending, or the settlement of, such an action might well order the employer to put into effect programs at cross purposes with "the particular solutions which the majority representative [the union] would advocate." But Congress was willing to tolerate such consequences in the vindication of Title VII rights, and there is no reason to believe that Congress' views on this

[16] A union represents the desires of the majority of its members. Thus the interests of a majority white union and its minority members are often essentially conflicting on racial issues. *See Alexander* v. *Gardner-Denver Co., supra*, 94 S. Ct., at 1024-25, n. 19. This is obviously so since in case after case, Title VII remedies have required changes in testing procedures, seniority systems, referral practices, and other union-supported devices which have in the past advantaged white workers and disadvantaged minority workers, or the imposition of affirmative action plans to undo the effects of past discrimination participated in or condoned by a union. *See, e.g., Griggs* v. *Duke Power Co., supra*, and the cases cited at page 19, *supra*. In fact, the Board admits as much. NLRB Br. 23-24. And it is no answer to claim, as does the Board, NLRB Br. 31 n. 12, that all such problems are obviated by the union's duty of fair representation:

> "[A] breach of the union's duty of fair representation may prove difficult to establish. . . . In this respect, it is noteworthy that [despite the existence of the duty of fair representation] Congress thought it necessary to afford the protections of Title VII against unions as well as employers." *Alexander* v. *Gardner-Denver Co., supra*, 94 S. Ct., at 1024-25, n. 19.

[17] In fact, a strong argument can be made from the fact that the minority employees need greater protection when the union disagrees with their views than when it agrees. See Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L.J. 47, 67 (1969).

sort of "divisiveness" depended upon the filing of a complaint in court. Thus, Congress has simply not authorized the union "to maintain a united front" where the minority workers believe that their rights to fair racial treatment are not adequately protected.

A slight variant of the Board's argument here is its claim that even where minority employees and the union agree both as to the existence of discrimination and as to the necessary remedies, the possibilities for conflict of tactics and timing "are legion" and such conflicts will undermine the union's position. NLRB Br. 22. As the preceding discussion made clear, this contention too is simply irrelevant. Where disputes over tactics arise, minority employees have a statutory right to pursue their Title VII remedies whatever the effect on the union.

But even assuming the relevance of the argument, it is factually unsupported here. There were no pending overall contract negotiations between the local union and the Emporium which the handing out of the leaflets embarrassed. Moreover, as a factual matter, in terms of the specific issue as to the elimination of discrimination, there was no dispute in tactics and the actions of Hawkins and Hollins did not undermine the position of the local union. Indeed, the local so states in its *amicus* Brief herein in support of respondent.

Second, as a legal matter, the Board has consistently taken the position—though as the citations below demonstrate, the courts have not always agreed—that a wildcat strike by dissident employees is a protected activity so long as the strike does not breach the collective bargaining agreement and is generally supportive of the union's position. *See NLRB* v. *R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964); *San Juan Lumber Co.*, 154 N.L.R.B. 1153 (1965), *aff'd per curiam*, 367 F.2d 397 (9th Cir. 1966); *Lee A. Con-*

saul Co., 175 N.L.R.B. 547 (1969), *rev'd per curiam*, 469 F.2d 84 (9th Cir. 1972). The leafleting here was not in breach of any provision of the collective bargaining agreement, was a less drastic measure than a wildcat strike, and was generally supportive of the local union's position.

We are at a loss to understand the rationale by which a wildcat strike—which is plainly not specifically authorized by any statute—would be protected when supportive of the union's position, but a similarly supportive exercise of Title VII rights by minority employees would not be.[18] It would be a strange ordering of prorities among "concerted activities" under Section 7 of the NLRA to prefer wildcat strikes to leafleting against discrimination, even if the objective of the latter was not additionally supported by the Civil Rights Act.

3. *"Scylla and Charybdis."* The petitioners and a number of the *amici* who support them claim that the decision of the court below unfairly traps the employer between equally untenable alternatives. Thus, the Board goes so far as to contend that

> "the employer would be placed in the position of running a serious risk of committing an unfair labor practice no matter what he did to resolve the situation: taking reprisals against the dissident employees would violate Section 8(a)(1) if their activities were subsequently held to be protected; but bargaining with the dissidents would violate Section 8(a)(5) if their activities were unprotected." NLRB Br. 21-22.

The Emporium makes the same argument somewhat more vividly: it claims that the employer is now required to bargain with minority employees and raises the spectre of groups of black, yellow, red, and brown employees, and

[18] The AFL-CIO's order of priorities appears to favor such a result. AFL-CIO Br. 13-14.

even women, each with conflicting demands, besieging their employer. Emporium Br. 7-9.[19]

These arguments not only misinterpret the decision of the Court of Appeals, but misunderstand the entire relation between minority rights and the bargaining process. First, no decision has held, and no party to this proceeding contends, that any employer is required to bargain with any minority employee. This is a discharge case, not a refusal to bargain case; the charges were preferred against the Emporium for firing the two men, not for refusing to bargain with them. All that is required of the employer is that he not fire a minority employee who seeks to bargain as to issues of racial discrimination. Hence, if the employer believes that he will be faced with conflicting demands, or for any other reason does not wish to discuss his racially discriminatory policies with his minority employees, he need not do so. He may simply sit back and wait for them to file a Title VII suit. If he does not want to discuss the matter even then, he can wait for the courts to resolve it.

Second, the Board's contention that the employer could be guilty of a Section 8(a)(5) unfair labor practice if he bargained with minority employees simply misunderstands the statutory framework and begs the question: an employer can hardly commit an unfair labor practice by settling a Title VII claim. As noted above, minority employees are entitled to settle their Title VII claims short of litigation. Similarly, an employer is entitled to defend against or settle his employees' Title VII claims. Indeed,

[19] This same practical problem—to the extent that it is a problem—of mutually inconsistent minority demands would, of course, confront an employer even if his plant or shop were unorganized and, accordingly, he could not even attempt to cite Section 9(a) of the NLRA against the various minorities.

Title VII strongly encourages such settlements. Hence, an employer's meeting with minority employees in an attempt to settle disputes over Title VII rights cannot be an unfair labor practice.

Third, in any instance in which the rights of individual employees are involved, the employer faces some risk of different groups of employees seeking different results. Thus, for example, in *United States* v. *Local 189,* 282 F. Supp. 39 (E.D. La. 1968), *aff'd,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970), black employees, in that case represented by the government, and white employees, represented by the union, made conflicting demands upon the employer. Similarly, in the *Air Line Stewards* case, *supra,* one group of employees represented by the union and another representing themselves made different demands. In both instances, the dispute ultimately had to be resolved by litigation. Indeed, that is what the courts are for—to resolve disputes that cannot be negotiated. But the fact that in occasional instances conflicting viewpoints between majority and minority employees, or even as between different minority employees, may necessitate litigation to resolve a dispute hardly means that minority employees should be forbidden to attempt to resolve disputes short of litigation.

Fourth, in any case, the facts here are that Hawkins and Hollins asked to meet with the president of the Emporium to discuss problems of racial discrimination, but the president would not talk to them. The union supported the minority workers and there were no conflicting demands by others. In fact, no specific demands were made at all since the Emporium refused to discuss the matter. Thus, as a matter of fact, the Emporium was in no sense "trapped" by conflicting minority viewpoints.

4. *"Economic Coercion."* It is next claimed that if an employer is picketed or leafleted it must, as a practical matter, either endure "economic coercion" or bargain with the minority group. Emporium Br. 6. The Emporium's contention in this regard may well be true, but is entirely irrelevant. There are many situations under the labor laws in which an employer may be legally justified in refusing to take a particular action, but is nonetheless legally subject to economic pressure. For example, in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), an employer who hired only whites at a particular grocery store was picketed by an organization composed of black neighborhood residents. This Court held that the picketing was protected by the anti-injunction provision of the Norris-LaGuardia Act even though the picketing persons were obviously not employed by the grocery company and the company had no duty to bargain with them. Also significant in this regard is *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477 (1960). In that case, union members conducted harassing activities—including picketing and distributing leaflets outside the offices of the company involved—in order to put economic pressure on the employer during the bargaining. That activity was held to be perfectly consistent with the goals of the NLRA:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the [labor law] system . . . ." 361 U.S., at 489.

5. *"Violation of Section 8(b)(7)(A)."* The Board and the Chamber of Commerce contend, apparently seriously, that Hawkins' and Hollins' activities violated Section 8(b)(7)(A) of the NLRA. NLRB Br. 37-39; Chamber of Commerce Br. 4-5 n. 4. That section of the NLRA makes it an unfair labor practice for a

> "labor organization . . . to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with [it] as the representative of his employees . . . where the employer has lawfully recognized . . . [another] labor organization." 29 U.S.C. § 158(b)(7)(A).

There are a number of difficulties with this argument. First, as a procedural matter, the Board is suggesting that its decision be affirmed on a rationale it did not follow at the administrative level. Such a suggestion is plainly unacceptable under well-established principles of administrative law. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); *American Trucking Ass'ns* v. *United States*, 364 U.S. 1, 14 (1960).

Second, Section 8(b)(7)(A) applies only to labor organizations. To interpret the NLRA to turn Hollins and Hawkins, standing on the street corner in San Francisco passing out leaflets, into a labor organization requires a linguistic tour-de-force well beyond that usually countenanced, at least in our legal system:

> "In actual practice, the section [dealing with actions undertaken by an organization] was so broadened that no organization whatever was required. I myself experienced the subtle application of this section. *Two* of us had secretly exchanged thoughts—*in other words* we were the beginnings of an organization, *in other words* an organization!" A. Solzhenitsyn, *The Gulag Archipelago* 66-67 (Fontana ed. 1974) (emphasis original).

Third, Section 8(b)(7)(A) was designed to safeguard employers against situations in which rival unions seek to represent or negotiate on behalf of employees. It is obvious that Hawkins and Hollins were not seeking to represent the Emporium's employees in any traditional

sense. Thus, Hawkins and Hollins were not interested in executing a separate collective bargaining agreement or attacking the existing agreement on wages, hours, and the like. Neither were they attempting to establish a continuing negotiating relationship with their employer. Rather, Hawkins' and Hollins' actions in seeking to negotiate were narrowly limited to issues of racial discrimination current at the time. As the earlier discussion demonstrated, Title VII provides minority employees with the right to discuss such issues with their employer without consultation with the union and without regard to the terms of the collective bargaining agreement. *Alexander* v. *Gardner-Denver Co., supra.* Section 8(b)(7)(A) cannot properly be intepreted to prohibit activity specifically authorized by Title VII.

6. *"Unlawful Activity."* Finally, the Chamber of Commerce and the Board make a catch-all and general assertion that Hawkins' and Hollins' "picketing" was "unlawful" and, hence, cannot be protected activity. Chamber of Commerce Br. 4; NLRB Br. 40. But it is plain that, whatever the resolution of this case may be, the handing out of leaflets protesting racial discrimination by an employer is hardly "unlawful." Leafleting for work-related purposes is a lawful, protected activity which a union may not waive or impede through the collective bargaining agreement. *NLRB* v. *Magnavox Co., supra.* Indeed, leafleting to protest racial discrimination in employment was specifically upheld as a labor activity in *New Negro Alliance* v. *Sanitary Grocery Co., supra.* In fact, it seems clear that the activity in which Hawkins and Hollins engaged on the public sidewalks of the City of San Francisco was protected by the First Amendment to the United States Constitution. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). As such, it cannot be said to be "unlawful."

Even if the "objective" of the leafleting could make it "unlawful," which seems to be a dubious proposition, it can hardly be said that the objective of the leafleting here —whether viewed as ending racial discrimination or, as the Examiner found, to treat with the employer as to the problem of racial discrimination—is an unlawful one. It is symptomatic of the grudging view of Title VII of the Civil Rights Act espoused by the Board throughout that the Board equates the activity here with criminal conduct of the sort referred to by this Court in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S., at 803, as being the kind of "deliberate, unlawful activity" which Title VII of the Civil Rights Act does not protect. NLRB Br. 40. This, of course, is simply not such a case.

CONCLUSION

In the present case, Hawkins and Hollins were fired for engaging in concerted activities which had as their purpose the vindication of individual statutory rights vested in them by Title VII of the Civil Rights Act. Those rights are personal and may be pursued notwithstanding the existence of other remedies under the collective bargaining agreement and notwithstanding the exclusivity principle set forth in the NLRA. Since Hawkins' and Hollins' actions were classic protected concerted activities, and since for the reasons stated their objective did not take these activities out of the protection of Section 7 of the NLRA, Hawkins' and Hollins' discharge was an unfair labor practice under Section 8(a)(1) of the NLRA.

For these reasons, insofar as the Court of Appeals set aside the Board's order, its judgment was correct. However, since Title VII rights are independent of the collec-

tive bargaining agreement or the action of the union in enforcing that agreement's provisions against racial discrimination, the legality of the objectives of the individuals, and their protection under Section 7 of the NLRA, does not, as the majority of the Court of Appeals held, depend on whether the union was attempting to process Hawkins' and Hollins' grievances "to the fullest extent possible by the most efficacious means." Accordingly, this Court should now order that Hawkins and Hollins be reinstated.[20]

Respectfully submitted,

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[20] The majority of the Court of Appeals included in its remand order a requirement that the Board determine whether Hawkins' and Hollins' leaflet was "disloyal" within the meaning of *NLRB* v. *Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) (disparagement of employer's product or services). The Trial Examiner considered this issue and concluded that the Board has not in the past reached a finding of disloyalty based upon language and actions of the sort at issue here. (P.A. 101) There is no reason to require a reconsideration of that issue at this point.

Supreme Court, U. S.
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In the Supreme Court
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No. 73-696

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Petitioner,

VS.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
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VS.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

MOTION OF DEPARTMENT STORE EMPLOYEES UNION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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Department Store Employees Union, Local 1100, affiliated with Retail Clerks International Association,

AFL-CIO, (herein the "Union") respectfully moves this Court, pursuant to Rule 42 of the Supreme Court Rules, for leave to file a brief in the above-captioned proceeding as *amicus curiae*. In support of this motion, we show the following:

(1) Permission for the Union to file a brief herein as *amicus curiae* was sought from counsel for the various litigants, Emporium Capwell, the National Labor Relations Board and Western Addition Community Organization. Consent was granted by counsel for Western Addition and counsel for the Board, but counsel for Emporium Capwell has refused to consent to the filing of an *amicus curiae* brief by the Union.

(2) The Union has a substantial interest in this proceeding. The Union is, and at all material times has been, party to a collective bargaining agreement with Emporium Capwell and is the exclusive collective bargaining representative of employees of said Employer, including Tom Hawkins and James Joseph Hollins, whose discharges by Emporium Capwell are the central issues to be resolved in this proceeding.[1]

Furthermore, it is apparent from the Petitions which have been heretofore submitted to the Court by Emporium Capwell and the Board that the Union has a direct interest in this proceeding. Both of these parties seek to have this Court reverse the holding of the United States Court of Appeals for the District of Columbia because the Union is the exclusive bargaining representative of Hawkins and Hollins and assertedly the Court of Appeals' decision interferes with

[1]The Union was not a party in the proceedings below.

and frustrates the Union's status as such a statutory representative. The Union is indeed an important party to be heard from in determining whether its status as the exclusive bargaining representative of Hawkins and Hollins has been breached by the decision of the Court of Appeals.[2] Surely, neither Emporium Capwell nor the Board can effectively state what the Union views to be its obligations and rights as the bargaining representative involved herein.

(3) The Union does not believe that the present parties to this proceeding will fully and adequately set forth the questions of law involved herein. Thus, it appears from arguments so far made by Emporium Capwell and the Board that they wish to claim that Hawkins and Hollins acted inconsistently with the Union's status as their exclusive bargaining representative. On the other hand, it is to be expected that Hawkins and Hollins will contend that employees represented by a labor organization may bypass that organization in racial matters when it has not acted "to the fullest extent possible by the most expedient and efficacious means," as suggested in the decision of the Court of Appeals.

It may well be that neither of these extreme positions is appropriate based on the facts in this proceeding and would not establish a fair, effective view of the law. From the arguments made thus far in this proceeding, the Union has no reason to believe that this area for resolution will be adequately presented.

[2]The Union here has substantial interests in the outcome of the litigation just as did the employer in *N.L.R.B. v. Plasterers Local 79*, 404 U.S. 116, 78 LRRM 2897 (1971).

Wherefore, we pray that this Motion be granted and the Union be allowed to file a brief as *amicus curiae.*

Dated, March 19, 1974.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100

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AMICUS CURIAE BRIEF OF DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100

This brief *amicus curiae* is filed by the Department Store Employees Union, Local 1100 (hereafter the

"Union"). The Union is the collective bargaining representative for a unit of employees who work at the retail department store in San Francisco which is operated by the Emporium Capwell Company (the "Company"). Included in this bargaining unit are the two employees, Tom Hawkins and James Hollins, whose discharges by the Company are in issue herein.

The Union files this brief in support of the view that Hawkins and Hollins were improperly discharged by the Company for engaging in activity protected by the National Labor Relations Act, as amended (29 U.S.C. §151, *et seq.*) (referred to herein as the "Act"). The Union agrees with the result of the Court of Appeals below that the Company was not privileged to discharge Hawkins and Hollins, but, as noted in later portions of this brief, disagrees with some of that Court's reasoning.[1]

The Union files this brief pursuant to Rule 42 of this Court's rules. Leave was granted by the Court for its filing, when consent could not be obtained from all party litigants.

[1]The opinion of the Court of Appeals and the opinion of the National Labor Relations Board (hereafter the "Board") are set forth in the appendix to the petition for certiorari in Case No. 73-696 and references herein to them will be designated "Pet. App." "A." refers to the separate appendix before the Court.

STATEMENT OF THE FACTS[2]

A. The employees' discharges:

Tom Hawkins and Jim Hollins, two young Black men, were employed as stock clerks by the Company; they worked as such for about two years and one year, respectfully (A. 5-6, 40-41). On November 11, 1968, they were discharged by the Company.

Each of the two employees was given an identical notification of the reasons for his discharge (Pet. App. 10, n. 18; A. 18-19, 51-52):

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

The written warnings referred to in their discharge notices had stated the following (Pet. App. 10, n. 17; A. 106, 14-15):

> On November 2, 1968, you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.
>
> These statements are untrue and are intended to and will, if continued [,] injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

[2]This rather lengthy Statement of Facts is necessary because the Board, the Court of Appeals and some of the briefs to this Court have presented the facts in a manner which distorts the real isues.

> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.[3]

When the employees were handed their warnings, there was no other discussion regarding the reasons for the notification (A. 14-15, 49-50).

The Union filed a grievance in behalf of the two employees, protesting their discharges pursuant to the existing collective bargaining agreement (Pet. App. 10, 103, n. 13).

B. The events which led to the discharges:

On October 22, Hawkins, Hollins and several other employees called a press conference, which was attended by representatives of various media (Pet. App. 8; A. 10-11, 47-49). The employees charged that the Company was engaging in racial discrimination and that there might be a boycott against the Company (Pet. App. 8; A. 9-11, 47-48).

On November 2, the two employees and two others distributed leaflets to members of the public entering and leaving the Company's store (Pet. App. 8-9; A. 12-14, 46-47). The employees passed out their leaflets during their own time. No store entrances were obstructed, the Company's merchandise was not

[3]The above-quoted warning was given to employee Hawkins; the warning given to Hollins was nearly identical, but, in addition, included the charge that "a public statement at a press-conference" made by Hollins, similar to the literature he distributed to the public, into the general charge of an "unjustified attempt to injure your employer" (Pet. App. 10, n. 17; A. 114, 48-50).

criticized and there was no violence or encouragement of violence (*ibid.*). The leaflets accused the Company of following discriminatory policies against various racial minorities and urged recipients "to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium" (Pet. App. 9; A. 107, 12-13, 46).

As noted, as a result of their distribution of leaflets on November 2, Hawkins and Hollins were given warning slips. Nonetheless, on the next Saturday, November 9, the two employees again distributed the leaflets under the same circumstances as the previous week (Pet. App. 10; A. 15-17, 50-51). And, as before, the employees passed out their leaflets in their non-working time; they were not scheduled to work on either distribution day.

C. The events precedent to the leafleting:

Before taking part in the activity which led to their discharges, Hawkins and Hollins first went to the Union with their complaint over the Company's practices of racial discrimination. On April 3, 1968, they and a group of other minority employees met with Walter Johnson, Secretary-Treasurer of the Union (Pet. App. 3-4; A. 73). Johnson was told "there were less opportunities for those who were in the minority race, not only Negroes, but we had Filippinos and all different groups represented. Among the grievances mentioned were the facts that they had probably not proper treatment from the

supervisors and also not the opportunity for promotion" (Pet. App. 4; A. 73).

The Union's then existing collective bargaining agreement with the Company provided, *inter alia* (A. 101):

> No person shall be discriminated against in regard to hire, tenure of employment, job status by reason of race, color, creed, national origin, age or sex.

Subsequent to the April 3 meeting, Secretary-Treasurer Johnson prepared a memorandum setting forth various employee complaints against the Company, including the charge of racial discrimination—"[p]robably the most important matter raised" (Pet. App. 4; A. 111). The memorandum was submitted to the Company's multi-employer organization, the San Francisco Retailers' Council (Pet. App. 4; A. 73-75, 79). Thereafter, a meeting concerning the memorandum was held between the Union and representatives from the Retailers' Council and Company (Pet. App. 4; A. 73-74).

As a result of the initial April 3 meeting, it became the official view of the Union that the Company was engaging in racial discrimination in its employment practices (Pet. App. 81; A. 78-79). Again, in early May, Johnson met with some minority employees and the Company's discriminatory practices were discussed, particularly focusing on the inability of one Black employee, Russell Young, to get a promotion (Pet. App. 4; A. 74, 78).

Several months then passed.[4] In September, Johnson and his assistant, Griffin, met again with some minority employees, including Hawkins and Hollins. Johnson informed the employees that the Union was filing discrimination charges against the Company under the bargaining contract and would take the matter to an Adjustment Board (Pet. App. 5; A. 75).[5] And, on the following day, September 4, Johnson did send a notice to the Retailers' Council which requested convening the Adjustment Board, charging the Company with violating the bargaining contract's ban on racial discrimination (Pet. App. 6; A. 80, 119).

However, at the September 3 meeting frustration was expressed by the employees. They suggested picketing the Company, but Johnson told the employees, "we [the Union] couldn't participate in any boycotting activities, that individuals could take whatever action they wanted to as long as it was legal" (Pet. App. 6; A. 81). "I said that an individual has the right to take action, but a union could not," Johnson recalled (A. 81-84). Griffin, who was also at that meeting, recalled that Johnson told the

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[4]From May to September, discussions continued, but there was some delay caused by vacation schedules of the minority employee (A. 74).

[5]The Union-Company bargaining agreement had a grievance and arbitration provision, which called for submission of disputes to an Adjustment Board and then had reference to arbitration, if the Adjustment Board could not resolve the dispute (Pet. App. 3; n. 5; A. 101-103).

was violated by Hawkins and Hollins in two ways: (1) that they abandoned the contractual grievance procedure set forth in the Union-Company collective bargaining agreement; and (2) they were "seeking to initiate direct negotiations with [the Company] by picketing and boycott activities" (Pet. App. 55, n. 2).

The Court of Appeals disagreed. Rather, the Court below found that whatever interference was caused to the existing collective bargaining relationship between the Company and Union by the independent activity of Hawkins and Hollins, it was not "sufficient to remove these concerted activities here from the protection of the Act" (Pet. App. 24). We agree with the result reached by the Court of Appeals—that the Company's discharge of Hawkins and Hollins violated the National Labor Relations Act.

B. This case does not require resolution of the difficult issue concerning the reach of the "exclusivity principle":

Unfortunately, some elementary considerations inherent in this case have been overlooked. Thus, much of the discussion found in the opinions below centers on the question of whether the alleged desire of Hawkins and Hollins to bargain independently of the Union with the Company violated the exclusivity principle. We do not, however, believe this issue can be properly raised in the circumstances of this case.[7]

[7]Of course, Board members Jenkins and Brown, in their dissenting opinions at the Board level, found the evidence was wholly insufficient to even find there was an effort by Hawkins and Hollins to enter into bargaining with the Company (Pet. App. 58, n. 4, 75-77). We agree the evidence on this point to be seriously wanting and concur with the view: "There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances" (Pet. App. 76-77). In this regard it is noteworthy that when Hollins actually did approach the Company president, he merely said, "I want to talk about a situation that I felt should be discussed about things that were happening among minority employees at the store" (A. 65). This one hard fact in the proceeding hardly constitutes either a bargaining proposal or demand. Indeed, the employees declined the Company's offer to meet with the personnel director (A. 64-65).

As a matter of uncontested fact, Hawkins and Hollins were not discharged for any effort to bargain with the Company. Rather, they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company (*supra,* pp. 3-4). Indeed, with slight exception, the Company was not even aware of any intent to bargain on the part of Hawkins and Hollins when they were fired, and nearly all the evidence pertaining to this issue was adduced only at the Board hearing—long after the discharges.[8]

[8]The conclusion that Hawkins and Hollins desired to bargain with the Company centers essentially on private remarks regarding their desire to talk with Company President Batchelder (see Pt. App. 75). It was at the October 16 Board of Adjustment hearing where the employees, before Company representatives, announced their desire and their remarks then, some three weeks before the discharges, clearly played no role in the Company's termination action. Nor was Hollins' actual approach to the Company president even raised as a basis for the discharges (see Note 5, *supra*).

From the very outset of this proceeding, therefore, the legal issues have been confused. The principle that minority groups of employees cannot demand bargaining where they are represented by a majority representative had nothing to do with the discharge of Hawkins and Hollins. They were fired because of their demonstration and protests against discriminatory employment practices. And, it is well settled that the presence of an unprotected element in the means used to achieve the employees' object cannot serve as a defense where the employer's dissatisfaction relates solely to protected aspects of their conduct. See *N.L.R.B. v. E. W. Buschman Co.,* 380 F.2d 255, 257-258 (C.A. 6), cert. denied, 389 U.S. 1045; *N.L.R.B. v. Anchor Room Mill,* 228 F.2d 775, 782 (C.A. 5); *N.L.R.B. v. Murray-Ohio Mfg. Co.,* 358 F.2d 948, 950 (C.A. 6); *Cone Brothers Contracting Co.,* 158 N.L.R.B. 186, 212. Thus, we do not believe it can be fairly said that Hawkins and Hollins were discharged for any demand to bargain on their part.

The Board's Trial Examiner, understanding the importance of the foregoing, did make an attempt to relate the Company's discharge action to the legal issues actually raised. Noting that the "warning notice given the two employees establishes the basis on which the discharge action occurred," the Trial Examiner found that one of the two reasons given by the Company was "that they were acting outside the ample legal remedies that existed to correct any discrimination. . . ." (Pet. App. 105, n. 15). From this the Trial Examiner, with Board approval, concluded (*ibid.*):

> The reference to legal remedies is reasonably construed as meaning that their course of action lay outside the terms of the bargaining agreement which Respondent and the Union were bound to follow.[9]

The crux of the Board's finding against Hawkins and Hollins, therefore, was that their activity protesting the Company's discriminatory practices was somehow barred by the existing collective bargaining agreement. But, the conclusion is legally unwarranted on the record in this proceeding.

First, it is beyond dispute that employees have a protected right to distribute literature geared to concerted employee interests on an employer's property as long as they do so during their nonworking hours. And, where an employer either seeks to prohibit this distribution right by rule or discharge, there is clearly a violation of employee rights. *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 796-797, 801, *et seq.*; *N.L.R.B. v. Walton Mfg. Co.,* 289 F.2d 177, 180 (C.A. 5); *Jas H. Matthews & Co. v. N.L.R.B.,* 354 F.2d 432, 441 (C.A. 8), cert. denied, 384 U.S. 1002; *P. R. Mallory & Co., Inc. v. N.L.R.B.,* 389 F.2d 704, 709-710 (C.A. 7); *N.L.R.B. v*

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[9]Of course, there is absolutely no evidentiary support for this conclusion. The Company never sought to explain its reference to "ample legal remedies," which obviously could have referred to various available administrative agency remedies rather than the collective bargaining contract.

Indeed, the Company previously threatened to discharge the employees for distributing leaflets (A. 14, 50). Those threats and the entire language of the dismissal letters make it clear that the discharges were for distributing leaflets, not for attempting to bargain individually with the Company.

Miller, 341 F.2d 870, 873 (C.A.2); *N.L.R.B. v. United Aircraft Corp.,* 324 F.2d 128, 129-130 (C.A. 2), cert. denied, 376 U.S. 951. Second, as this Court recently held, an existing collective bargaining agreement cannot waive the right to distribute literature during nonworking hours, as was involved here. *N.L.R.B. v. The Magnavox Co.,* ..... U.S. ....., 94 S.Ct. 1099 (1974). And see, *Gale Products,* 142 N.L.R.B. 1249. While normally the literature distribution cases deal with union campaign material rather than issues of racial discrimination, no distinction between them is warranted since they both stem from the same broad protection afforded by Section 7 and they are surely of comparable importance under our Federal labor laws. See *General Electric Co.,* 169 N.L.R.B. 1101, enforced per curiam, 411 F.2d 750 (C.A. 9).

Moreover, the Board's conclusion that Hawkins and Hollins could be compelled to make their racial protests solely through their existing contractual processes, or risk losing their jobs, is contrary to this Court's view in *Alexander v. Gardner-Denver,* ..... U.S. ....., 94 S.Ct. 1011 (1974). In *Gardner-Denver,* this Court held that an employee protesting racial discrimination was not limited to his contractual grievance and arbitration processes, but could also pursue such claims in the forums provided by Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e, *et seq.*):

> We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. [94 S.Ct. at 1025.]

It is difficult to see why, if an employee can proceed in legal forums outside his collective bargaining agreement, he cannot likewise publicize his dispute as well. This is especially true where, as here, the employees seek to publicize their dispute in ways which have been historically protected and safeguarded no less than the newer legal forums provided under Title VII.[10]

Board counsel have suggested to this Court, without expressly stating, that employee distribution of literature and boycott activity can be prohibited since there are alternative legal avenues in which to protest racial discrimination (Bd. Br. 26-29). But, the argument is based purely on policy contentions urged by appellate counsel, without any express basis in existing legislation. Neither Congress nor the courts have foreclosed otherwise lawful publicity campaigns simply because the issue in dispute could be subjected to legal tribunals. Furthermore, such a view would upset the delicate balance which Congress has established between specific limitations on employee

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[10]It should be noted that the Board below made no finding that the employees' "boycott" activity, as distinguished from a simple racial protest, violated provisions of the Act and, we submit, no such finding would be justified. However, pursuant to the Court of Appeals decision, the Board could still consider on remand whether the boycott appeals were framed in such a way under the tests employed in *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard),* 346 U.S. 464, 477-478, as to "have deprived the attackers of the protection of [Section 7 of the Act] . . . ."

picketing and the other forms of speech involved in employee appeals to the public. As noted in *N.L.R.B. v. Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 63:

> We . . . have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," . . . that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban on picketing might collide with the guarantees of the First Amendment.

In sum, the Board's decision constitutes an unwarranted conclusion that employees may no longer employ the traditionally protected right to peacefully distribute literature, where there is an existing collective bargaining agreement which contains provisions that may conceivably provide a remedy to their complaint. The Board's opinion may not come to grips with this issue, but it surely forms an important part of the Board's subliminal analysis. The Union submits that its collective bargaining agreement intended no such result and could not, in view of existing legal precepts.[11]

[11]Through the unfortunate characterization of the employee activity at stake herein as "picketing," Board counsel assert the contention that such activity violated Section 8(b)(7)(A) of the Act (Bd. Br. 37-40). Of course, such a finding is wholly novel to this proceeding for the Board itself never considered such a contention or made such a finding. To now introduce this argument is in direct conflict with this Court's admonition against *"post hoc* rationalizations" of appellate counsel, *N.L.R.B. v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 444, and would bring with it a host of considerations never considered by the government's administrative agency which is charged with the responsibility, not least of which is whether there was actual picketing within the Act's meaning. The record demonstrates there was no picketing but only distribution of handbills (A. 12, 15, 45-46, 50).

C. The activity engaged in by Hawkins and Hollins did not interfere with the existing collective bargaining relationship and, therefore, they did not lose the protection of Section 7:

It is obvious that "[t]he facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employee rights and the collective bargaining process."[12] We have already discussed one key element to this balance, generally ignored in the proceedings below. However, as we move into other considerations which played a significant part in the Court of Appeals' decision, the existing circumstances and considerations continue to weigh in the favor of Hawkins and Hollins.

As the Court of Appeals noted below, the approaches to the question involved herein have been: (1) "to protect minority concerted activity, such as walkouts or picketing, whenever it is not in derogation of the union's position on the matter in question"; and (2) "to find the minority concerted activity protected only when it is not disruptive of the concept of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position." (Pet. App. 16-17). The Union agrees with the Court below that the activity of Hawkins and Hollins was not of sufficient extreme to lose the protection of the Act.

[12]*Local 12, United Rubber Workers v. N.L.R.B.,* 368 F.2d 12, 16 (C.A. 5), cert. denied, 389 U.S. 837.

Prior to the Court of Appeals decision herein, the existing Board and court precedent on the instant subject matter was somewhat ambiguous. Thus, the Ninth Circuit, in *N.L.R.B. v. Tanner Motor Livery, Ltd., supra,* 416 F.2d 216, which the Board relies on (Bd. Br. 19), held that a minority group of employees who were represented by a labor organization did not have the right to take independent action against their employer which interferes with their union's collective bargaining role. But, *Tanner* had several important links missing from the Hawkins and Hollins matter. First, there was no indication the dissident employees initially (or at any time) took their complaint to their majority representative and the Court expressly left unanswered whether this consultation would have carried forward the employees' protected rights. Second, there was no showing whatsoever as to what their labor organization's position was on the dispute. Third, the Court recommended in its remand that the Board consider whether the employer waived his right to discharge the employees when he failed to base the discharges on the ground that the picketing there was disruptive of the collective bargaining process. Accordingly, *Tanner* cannot be construed as conflicting with the Court of Appeals decision below.

Other precedent cited by the Board is likewise insufficiently in point to be of much help.[13] Except for

[13]For example, in *Plasti-Line, Inc. v. N.L.R.B.*, 278 F.2d 482 (C.A. 6), the minority group employees went on actual strike in violation of their contract's no-strike provision and their union's membership voted not to support their strike action and resulting

Tanner, these cases primarily deal with minority employee action which either breached existing labor contracts or resulted in a "wild-cat" strike situation.[14]

On the other hand, other Board and court decisions have continued Section 7's protection for a minority group's actions which were independent of their majority labor organization. See *N.L.R.B. v. R. C. Can Co.,* 328 F.2d 974 (C.A. 5).[15] In *Western Contracting Corp. v. N.L.R.B.,* 322 F.2d 893, 899 (C.A. 10), the Court stated:

> The [minority group of] employees were entitled to engage in concerted action so long as such action was not in violation of their contract or in derogation of the position taken by their bargaining agent. The action here was clearly in

discharges; likewise, in *Moore v. Sunbeam Corp.,* 459 F.2d 811 (C.A. 7), the discharged employee had clearly breached the existing labor contract and his union not only agreed he so breached it, but refused to support any grievance in his behalf.

[14]*E.g., Lee A. Consaul Co. v. N.L.R.B.,* 469 F.2d 84 (C.A. 9) (wild-cat strike during negotiations and labeled "unauthorized" by the employees' labor organization); *N.L.R.B. v. Shop Rite Foods, Inc.,* 430 F.2d 786 (C.A. 5) (unauthorized strike by minority group of employees over issue not taken up by their union and action which was repudiated by the union); *N.L.R.B. v. Draper Corp.,* 145 F.2d 199, 203 (C.A. 4), where that Court noted the importance of features unique to strike action by minority employees: "It is perfectly clear not only that the 'wild-cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the Act to promote."

[15]While it is true, as Board counsel noted (Bd. Br. 19, n. 10), that in *Shop Rite Foods, supra,* 430 F.2d at 791, the Fifth Circuit stated that *R. C. Can* is "of doubtful viability," the Court in *Shop Rite* demonstrated significant caution in measuring the protected nature of minority group action where it is consistent with the majority representative's policies and went to lengths to inquire into the specific circumstances present in that case. Thus, we do not believe *Shop Rite Foods* can be read as overruling *R. C. Can.*

support of rather than in derogation of the union's position.

And, until this proceeding, the Board itself followed the rule that minority group action did not lose the protection of the Act where it was consistent with their union's policy or position on the issue. See *San Juan Lumber Co.*, 154 NLRB 1153 (1965), affirmed per curiam, 367 F.2d 397 (C.A. 9); *Tanner Motor Livery, Ltd.*, 166 NLRB No. 35, reversed and remanded, 416 F.2d 216 (*supra*, p. 18); *Lee A. Consaul Co., Inc.*, 175 NLRB 547 (1969), reversed per curiam, 469 F.2d 84 (*supra*, Note 12).

Turning to the factors in this proceeding, in light of the foregoing precedent, they reveal nearly a total absence of interference by Hawkins and Hollins in the existing collective bargaining relationship between the Union and Company. To begin with, Hawkins and Hollins initially went to the Union with their complaint over the Company's racial discrimination. For a time they worked solely within the Union in dealing with the problem of discrimination. And, to a certain extent they were central figures initiating action which brought the problem of discrimination to the attention of both the Union and Company.

Indeed, largely as a result of their activity, it became the Union's official position that the Company engaged in racial discrimination. Moreover, the Union-Company contract expressly prohibited discriminatory employment practices. And, both the Union and Hawkins and Hollins acted in the same direction: to eliminate the Company's discriminatory

practices, albeit through different approaches to the problem.

Two other factors are significant. The individual activity engaged in by Hawkins and Hollins was in breach of *no* provision of the existing collective bargaining agreement and there is no showing whatsoever that it either disrupted the on-going relationship between the Company and Union[16] or that it even seriously disrupted the Company's business operations. Accordingly, the two employees' activity simply caused no significant interruption or disruption in the existing bargaining relationship and, therefore, Section 9(a) and its principle of exclusivity should not be employed to remove the employees' activity from the protection of Section 7.[17]

Nor do we believe the lack of complete unanimity between the Union and the employees demonstrates an incompatibility with the on-going collective bargaining relationship. To be sure, the employees chose to follow their publicity campaign, contrary to the desires of Union Representative Johnson, but at no time did Johnson denounce their action or demand they cease distributing their leaflets. And, when the two employees were fired, the Union moved quickly to file grievances in their behalf. The Union's support for Hawkins and Hollins sets this case miles apart

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[16]Indeed, the Union told Hawkins and Hollins they were free, as individuals, to take individual action (A. 81-83, 86).

[17]See Cox, *The Right To Engage In Concerted Activities*, 26 Ind. L.J. 319, 332 (1951): "Much can be said in favor of aggressive unions whose leaders are constantly pricked to action by militant minorities."

from many of those in which a union's actions demonstrated open conflict with the minority employee group.[18]

Furthermore, we submit that the two employees' refusal to participate in the on-going grievance process created no disruption to the bargaining relationship in this particular case. Had the employees refused to participate without conducting their own publicity campaign, their refusal would have been considered legally insignificant; had they cooperated and nonetheless continued their publicity campaign, the Company would still have discharged them. Moreover, their refusal to cooperate with the Union's grievance was surely an internal union matter, which the Company should not intervene in and use to buttress its discharge action. See *N.L.R.B. v. Wooster Division of Borg-Warner,* 356 U.S. 342. When the record evidence is carefully weighed, it shows a consistency in goals between the Union and Hawkins and Hollins and a divergence in tactics neither adversely affecting the Union nor disrupting the Union-Company relationship.

Unfortunately, the relatively simple factual setting of this proceeding is lost sight of by the Company and Board in their briefs to the Court. The Company raises the spectre that under the Court of Appeals decision it would have to bargain separately with racial minority groups, possibly dealing with each separate minority group claiming the right and that

[18]In fact, the Union supported Hollins and filed a grievance on his behalf despite his status as a non-member (A. 76).

the result would be separate agreements inconsistent to the existing collective bargaining agreement (Co. Br. 7-9, 14-15). Likewise, the Board discusses a myriad of bargaining possibilities wherein a majority representative may disagree with a minority group's bargaining position or its view of the existence of discrimination, and claims that independent bargaining would fragmentize the bargaining unit (Bd. Br. 20-26).

Most of the arguments made by the Company and Board are far too premature to be decided in this proceeding. It may well be that if a majority representative actually renounced a minority group's activity, or disagreed with that minority group's viewpoint in a dispute with the employer, or if the minority group proposed a solution which was contrary with either an existing collective bargaining agreement or to the majority representative's policy, then their activity would lose its protection under the Act. But, those problems are not present in this case. The Company was never put in the position of having to decide which of a multitude of representatives to deal with, nor was it ever faced with conflicting demands. Indeed, the evidence is so meager as to whether Hawkins and Hollins actually desired to bargain with the Company at all (see Note 7, *supra*), let alone to claim that their unannounced demands "put the Employer in any sort of quandary." *R. C. Can Co., supra,* 328 F.2d at 979.

Even assuming that Hawkins and Hollins aimed at bargaining with the Company, we do not under-

stand the Court of Appeals decision to authorize the conflicts and fragmentation raised by the Petitioners' briefs. The Court below stated (Pet. App. 29):

> Certainly collective bargaining must be orderly in the sense that no stable, meaningful agreement can be reached where various factions are free to make conflicting demands upon an employer.[19]

But, that is precisely the point involved in this proceeding: Hawkins and Hollins never presented anything to the Company which could be construed as inconsistent with Union demands. The Company fired them without ever listening to them.

We believe that if the Court of Appeals opinion is narrowly confined to the facts present before it, its ultimate conclusion makes great sense. It has prevented the Company from infringing on otherwise protected activity short of a demonstration that such activity presents identifiable conflicts to the employer or majority representative. And, it serves to encourage dissident employees to pursue their disputes within their own labor organization with some flexibility for divergence in approaches. So long as no conflict with the bargaining agent exists, the concept of exclusivity is not infringed.[20]

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[19]It is interesting to compare the majority's decision with that of the dissenting judge's. Unlike the majority, the dissenting opinion would hold that racial minorities have an absolute right to enter into bargaining with their employer, which might well result in the problems raised by the Board and Company in their briefs. The majority opinion, however, does not follow this approach and neither does the Union.

[20]There is one aspect to the majority decision in the Court below with which the Union strongly disagrees. We do not believe that the employees' protection under the Act can or should depend on whether their majority representative has acted on their complaint "to the fullest extent possible by the most expedient and efficacious means," as required by the Court. Counsel for the Board and Company have amply set forth the impossibility of working with this standard and the Union agrees with their views. We do not believe this standard of union responsibility is at all necessary in measuring when an employee's otherwise protected activity becomes unprotected. Furthermore, at the point in time when actual conflict between demands can be demonstrated and the majority representative refuses to agree to dissident demands, the way is still clear to test whether that majority representative has acted in an "arbitrary, discriminatory, or . . . bad faith" manner and, thereby, breached its duty of fair representation. *Vaca v. Sipes,* 386 U.S. 171 (1967). Given this employee protection against discriminatory union conduct, there is simply no need to add the substantial uncertainty to protected activity by making it depend, in part, on a union's perfection in problem solving.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should find that the Company violated Section 8(a)(1) of the Act by discharging employees Hawkins and Hollins for engaging in protected activity.

Dated, August 7, 1974.

Respectfully submitted,
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL COMPANY,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

—and—

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Motion for Leave to File a Brief, *Amicus Curiae*

Now comes the National Association for the Advancement of Colored People (Special Contribution Fund, Inc.) and respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The Interest of the *Amicus*

The National Association for the Advancement of Colored People, organized in 1909, is the oldest and largest civil rights organization in the country. It has a membership of 470,000 persons in 1,700 branches located throughout the 50 states. The principal objective of the organization is to ensure the political, educational, social and economic equality of Black persons. It endeavors to remove all barriers of racial discrimination through the democratic process. From the date of its founding, one of its major concerns has been the attainment of equal economic opportunity for the nation's Black minority.

A substantial portion of the membership of the National Association for the Advancement of Colored People is comprised of working men and women whose lives are directly affected by the national will—or lack of it—to eradicate the vestiges of an economic caste system based on race. In addition, the efforts of the organization in this regard have affected and will continue to affect hundreds of thousands of black, as well as other minority, workers.

This case raises fundamental questions regarding the viability of Congressional enactments aimed at ending racial discrimination in employment. The decision of the National Labor Relations Board, if allowed to stand, will seriously impair the efforts of the National Association for the Advancement of Colored People to assist in effectuating the broad Congressional mandate that racial discrimination in employment must cease, as expressed in Title VII of the Civil Rights Act of 1964 and related statutes.

The written consent of the attorneys for both Petitioners, and for the Respondent, has been obtained, and is on file with this Court.

The National Association for the Advancement of Colored People is the largest national civil rights organization in the country, and as such, is vitally concerned with the employment rights and opportunities of Black Americans. The specific interests of the NAACP in this case are the protection of individuals who draw public attention to discriminatory employment practices through leafleting, pamphleteering and like means; and the full effectuation of the policies expressed in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. These interests are set forth more fully in the body of the brief accompanying this motion.

Because the NAACP is national in scope, it is able to address the issues raised by these petitions in the broad context of the unified national purpose to eradicate racial discrimination in employment.

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ARGUMENT

I.

Introduction

In *Miller* v. *International Paper Company*, 408 F.2d 283, 294 (C.A. 5), Judge Gewin observed that:

> . . . on the surface the present case concerns only the meaning of certain statutory provisions. But beneath the legal facade a faint hope is discernable rising like a distant star over a swamp of uncertainty and perhaps of despair. Those who love their work may sometimes forget that a successful human community requires the performance of many vapid and colorless tasks. Even the most tedious physical labor is endurable and in a sense enjoyable, however, when the laborer knows that his work will be appreciated and his progress rewarded. "Work without hope," said Coleridge, "draws nectar in a sieve, And hope without an object cannot live." The ethic which permeates the American dream is that a person may advance as far as his talents and his merit will carry him. And it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a gleam of light in the midnight of it all. [Footnotes omitted.]

That observation is equally applicable here. Although cast by Petitioners as involving conflicting statutory provisions, this case involves racial discrimination in employment.

The facts[1] which give rise to this litigation are that Tom Hawkins and Jim Hollins, two black employees of Petitioner Emporium Capwell Company, were discharged for

[1] Amicus adopts the statement of facts set forth in the Brief of Respondent.

protesting the racially discriminatory practices of their employer (Pet. App., pp. 88-89; A. 17-18, 51).[2] Following their discharge, Respondent Western Addition Community Organization filed unfair labor practice charges with the National Labor Relations Board, alleging that the discharges violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

The Board ruled, with two members dissenting, that the discharges were not violations of Section 8(a)(1), since the employees were members of a labor organization which is the exclusive bargaining representative within the meaning of Section 9 of the Act, and the protests amounted to an attempt by the employees to bypass the Union and bargain directly with the employer (Pet. App., p. 104). Therefore, the Board reasoned, Hawkins and Hollins were not entitled to the protection of Section 7 of the Act (Pet. App., p. 104-105).

On petition for review, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that, since Hawkins and Hollins were attempting to exercise rights guaranteed them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, an accommodation of § 704(a) of Title VII with § 7 of the N.L.R.A. entitled the employees to Section 7 protection (Pet. App., p. 20), unless the exclusive bargaining agent was acting to resolve the complaints of discrimination to the fullest extent possible by the most expedient and efficacious means (Pet. App., p. 28). The case was remanded to the Board for that determination to be made.

In this brief, Amicus will address two questions with which it is particularly concerned: Whether the Board

[2] "Pet. App." refers to the appendix to the petition for certiorari in No. 73-696. "A." refers to the separate appendix filed in this Court.

justifiably concluded that the activities of Hawkins and Hollins amounted to an attempt to bargain separately with respect to working conditions? and, assuming that it was justified in so finding, whether there exist sound reasons for denying to the discharged employees the protection of § 704(a) of Title VII?

II.

The Board's Conclusion That Hawkins and Hollins Were Attempting to Bargain Separately Has No Basis In This Record, and Reflects a Fundamental Misunderstanding of the Nature of Racial Discrimination.

The trial examiner concluded that Hawkins and Hollins were not entitled to the protection of § 7 of the National Labor Relations Act "because their activities amounted to, in short, no less than a demand that the Respondent bargain with the picketing employees for the entire group of minority employees on terms and conditions of employment" (R. 270, emphasis added).[3] The trial examiner reasoned that "separate bargaining" would undermine the right of employees to bargain through representatives of their own choosing, and would "place on the employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement." 485 F.2d at 924.

Implicit in that conclusion is a finding that Hawkins and Hollins were attempting to organize a new, separate labor organization to seek working conditions *different* from those enjoyed by the majority of the bargaining unit. Such a finding is unwarranted on this record, and is contradicted by the contextual inferences which must be drawn from these facts.

[3] This form of citation refers to the original record.

A. *The Concerted Activity Was Directed at Correcting Inequality of Treatment and Not to Creating a Separate Bargaining Unit*

The only record support for the trial examiner's conclusion that the dissident employees were attempting to bargain separately are Hollins' and Hawkins' statements that their purpose was "to try to talk to the top management to get better conditions for the Emporium" (A. p. 11; pp. 21, 28). The trial examiner obviously took these statements to mean that the employees wanted to talk to the president for the purpose of bargaining; that is, to negotiate a contract separate and different from the existing contract between the Emporium and the Union. In drawing such an inference from those isolated statements, however, the examiner necessarily ignored a substantial portion of the evidence which plainly indicated what the real purpose of the concerted activity was.[4]

When employees such as Tom Hawkins and Joe Hollins seek redress from racial discrimination, they do so not to gain any unearned privilege, nor do they seek favors they are not entitled to. They seek only equal treatment. The very word "discrimination" describes differing treatment. The record in this case indicates rather clearly that all Hawkins and Hollins sought was treatment on a basis similar to that which had been accorded to the white majority. Hollins, for example, explained that the reason for the leafleting was that minority people were not being treated fairly (A. p. 48). He based his judgment on his own experience—his individual complaint was that he was doing supervisor's work and not getting paid for it (A. p. 10)—and on the experience of several other employees (A.

[4] The trial examiner in any event was predisposed to ignore evidence regarding the purpose of the concerted activity, as indicated by his ruling that, "I have ruled out state of mind for twenty five years and I will rule it out now" (R. p. 34).

pp. 53-54). Hawkins explained that he took the action he did because black, brown, yellow and red people weren't being treated fairly (R. 35). Hawkins said that, "everybody had a basic grievance or basic complaint about how the Emporium was treating black, brown and yellow people and we wanted to get to the core of them and the purpose of the meeting, of talking to the president, was to try to get better conditions and this was the main purpose of it" (A. p. 21).

By seeking an audience with the president, the employees were doing no more than indicating that the normal channels of communication were not working. They had encountered frustration and delay at the hands of the Union (A. pp. 26, 81), and had attempted, unsuccessfully, to resolve the matter through the Company's personnel manager (A. pp. 64-65). All these employees wanted to do was to "get to the core" of the Emporium's discriminatory treatment. Nothing in that design connotes separate bargaining for different working conditions.

Perhaps in another context, the desire of a group of employees to speak directly with the president of a Company without going through the normal Union channels could be considered an attempt to bargain separately. But where that desire is the result of a quest for basic dignity, accorded by the Company as a matter of course to the majority of union members but granted sparingly, grudgingly and at random to the bargaining units' darker-skinned members, that conclusion cannot be drawn. The trial examiner's reluctance to consider, at the hearing, that racial discrimination provided the motivation for the employees' acts (R. pp. 34-35), and his complete disregard of motivation in making his findings and conclusions, cannot be justified in the absence of countervailing evidence from the Company that Hawkins and Hollins were attempting to

do something more or different from gaining equality of treatment. There was no such evidence. The trial examiner's conclusion, and the Board's adoption of it, demonstrate at best a lack of awareness of the problems encountered by racial minorities in seeking to accommodate the promise of equality of Title VII with existing discriminatory labor-management practices. That lack of awareness resulted here in conclusions that are simply unsupported by the record before this Court.

B. *The Concerted Activity Was Precipitated By the Failure of the Union to Process Grievances on a Group Basis*

"Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class." *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184, 186 (M.D. Tenn.). This important principle, announced early in the history of Title VII litigation, is recognized as a fact of life by minority working people throughout this country. Jim Hollins and Tom Hawkins knew that in 1968 when they sought to rectify the discriminatory policies of their employers: they realized that one cannot discriminate against an individual because he is black without likewise discriminating against all other black individuals. As Mr. Hawkins noted in his testimony before the trial examiner, ". . . *everybody* had a basic grievance or a basic complaint about how the Emporium was treating black, brown and yellow people . . ." (A. p. 21, emphasis added).

Thus it was for good reason that the complaining employees insisted that the Union process their grievances on a group rather than an individual basis. According to Tom Hawkins, if the grievances were processed on an individual basis, the Company would attempt to satisfy only a few of the grievances, and the broader problems of class-based discrimination would be ignored (A. p. 27).

Hawkins' reaction to the suggested Union approach is borne out of the experience of black workers in pressing for resolution of employment discrimination. Because human conduct toward a class or race of people is much less ambiguous than human conduct toward individuals, class discrimination is much less difficult to observe than individual discrimination founded on class-based animus. Cf. *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (C.A. 5); *Bolton* v. *Murray Envelope Company*, 493 F.2d 191 (C.A. 5); *Huff* v. *N.D. Cass Co. of Alabama*, 485 F.2d 710 (C.A. 5).

Hawkins and Hollins clearly recognized the inevitability of failure of the Union's efforts. That recognition, coupled with the design of their activity: to secure equal—not preferred—treatment, negates any inference that the purpose of their activity was to force the Company into a separate contract. The trial examiner's conclusion that separate bargaining was the purpose for the employees' leafleting is completely unjustified.

The National Labor Relations Board suggests that the employees' recognition of the futility of processing individual grievances, and the Union's insistence on proceeding in that manner, amounts in this case to a "dispute over tactics", and that such a dispute undermines the principle of majority rule embodied in § 9 of the N.L.R.A. (Board, p. 22).[5] But those differences are not tactical, they are substantive. The Union's failure to treat claims of racial discrimination as a class problem is, in effect, a failure to treat them at all. Quite properly, the Union recognized that discrimination existed, and quite properly it attempted to resolve it. But what counts in treating racial discrimination in employment is not whether an employer—or union

[5] This form of citation refers to the Brief of Petitioner National Labor Relations Board.

—recognizes and moves on the problem, but whether the problem is solved. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432; *Rowe* v. *General Motors*, 457 F.2d 348, 355 (C.A. 5); *Johnson* v. *Goodyear Tire and Rubber Co.*, 491 F.2d 1364, 1376-1377 (C.A. 5); *Baxter* v. *Savannah Sugar Refining Company*, 495 F.2d 437, 442-443 (C.A. 5).

The Court of Appeals, in reversing the Board, held that even though the Union may have appeared to be acting in good faith, unless the method chosen for resolution of the charges was the most expedient available to it, Hawkins and Hollins were entitled to § 7 protection even though they had sought to circumvent the bargaining unit. That holding clearly suggests that the court below recognized the inherent defect in the Union's approach to its minority members' complaints. The effect of the Board's order, then, is to penalize Hawkins and Hollins for recognizing the inefficacy of treating racial discrimination claims as individual problems. Such a result is clearly contrary to the Congressional mandate expressed in Title VII that employment discrimination must end.

III.

There Exist No Sound Reasons for Denying the Protection of Title VII in the Circumstances of This Case.

Section 704(a) of the Civil Rights Act of 1964, as amended by P.L. 92-261, March 24, 1972, 42 U.S.C. § 2000e-3(a), provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this Title, or because he has made a charge,

> testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title.

This Court has said that § 704(a) forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 796 (emphasis added).

It is difficult to conceive a factual situation more clearly indicating a protest of allegedly racially discriminatory employment practices than the facts presented by this case. Even assuming, *arguendo,* that record evidence existed to support the trial examiner's conclusion that the object of the concerted action in this case was to force the employer to bargain separately with the dissenting employees, it is nonetheless clear that the subject matter of that separate bargaining was intended to encompass no more than the issue of racial discrimination. Thus, the activities of Hawkins and Hollins fall plainly within the scope of § 704(a)'s protection.

Neither the trial examiner nor the Board addressed the issue of Title VII protected activity. Instead, the Board's decision was limited to whether or not the concerted action was protected by § 7 of the National Labor Relations Act. Petitioners, particularly the National Labor Relations Board, advance a number of reasons in support of this narrow focus. Most of those reasons are based on pure speculation, and none of them withstand scrutiny.

The National Labor Relations Board argues that "separate bargaining" of the kind sanctioned here by the Court of Appeals derogates from the authority of the exclusive bargaining representative (Board, p. 21). That is so, the argument runs, because of potential interference with the majority representatives authority by virtue of possible

disagreements over allegations of discrimination (Board, p. 22). To be sure, there will be disagreements between bargaining representatives and their minority members over allegations of discrimination. But allegations of discrimination are precisely what § 704(a) protects. *McDonnell Douglas Corp.* v. *Green, supra* at 796. Thus, whether or not a union agrees, protests of alleged discrimination are protected by § 704(a). Any potential interference with the majority representative's authority must therefore yield to this statutorily conferred right.

Separate bargaining would also require the employer to run a serious risk of committing an unfair labor practice, according to the Board (Board, p. 21). There is nothing to support such speculation. Amicus knows of no instance where an employer has been found guilty of an unfair labor practice for having dealt with and eradicated employment discrimination. Cf. *Savannah Printing Specialties* v. *Union Camp,* 350 F.Supp. 632 (S.D. Ga.). To the contrary, the most serious risk an employer faces in such a situation is that he will not act fast enough to eradicate employment discrimination. Cf. *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (C.A. 5). An employer who allows institutional practices—including bargained-for seniority systems—to stand in the way of prompt action to remove discriminatory barriers, faces substantially more hazardous risks in resultant Title VII action than it does from an unfair labor practice charge. Cf. *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980; *United States* v. *Georgia Power Company,* 474 F.2d 906 (C.A. 5); *Moody* v. *Albemarle Paper Company,* 474 F.2d 134 (C.A. 5); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (C.A. 5).

The Board's argument that a "special concession or benefit granted" to an individual will create industrial strife

(Board, p. 23) is specious in the context of this case. In the first place, the argument is founded on the erroneous assumption that Hawkins and Hollins were seeking "special concessions or benefits". There is absolutely nothing in the record before this Court to indicate that these employees were seeking anything other than equal treatment. We do agree with the Board that concessions made to minority employees would "disturb preexisting arrangements" and, "in many cases would adversely affect the interests of at least some of the employees not represented by the dissidents" (Board, p. 23). But courts have properly not hesitated to "disturb preexisting arrangements" when such a disturbance was necessary to meet the requirements of Title VII. *Savannah Printing Specialties Union* v. *Union Camp Corp., supra.* Further, the fact that the expectations of the majority might be frustrated is no bar to changing the established order so as to comply with the law. See *Acuff* v. *United Papermakers & Paperworkers, AFL-CIO,* 404 F.2d 169 (C.A. 5).

The Board also argues that "separate bargaining", if allowed here, would not necessarily stop here, and the principle of majority rule would therefore be substantially eroded (Board, p. 24). That argument is completely fallacious, since it presumes that, because the Court of Appeals approved separate bargaining over racial discrimination, it also must necessarily approve separate bargaining over other, unspecified issues. Nothing in the opinion below supports such speculation. The opinion, to the contrary, is careful to point out that the right to non-discriminatory treatment differs significantly from other "conditions of employment". 485 F.2d at 917. Thus, even though "separate bargaining" might not *logically* stop at racial lines (Board, p. 25), it will *legally* stop there. To suggest otherwise ignores the lower court's careful limitation of the rights involved in this case.

The Board suggests that, because Hawkins and Hollins had available to them contractual and statutory remedies other than the concerted activity at issue here, the protection of § 704(a) should be limited to those instances where an employee has "made a charge, testified, assisted, or participated in . . . an investigation, proceeding or hearing," thus reading out of the statute protection for those who "oppose[] any practice made an unlawful employment practice by this title . . ." (Board, p. 26-28). This approach to statutory construction is, to say the least, novel. The Board cites no authority to support it. By the same analogy, Petitioners might argue that, since internal Union remedies were available, protection of those who file charges or bring suit might also be withdrawn, since the bringing of a lawsuit against one's own union must also surely "decreas[e] union prestige and prevent[] the bargaining unit from maintaining a united front" (Board, p. 21). Petitioner's suggestion is therefore without either legal or logical support.

In its most serious mischaracterization, the Board argues that Hawkins' and Hollins' concerted activity will frustrate the purpose of Title VII, since it frustrates the good faith efforts of the bargaining unit to remedy employment discrimination (Board, p. 37). Although good faith efforts by the bargaining representative to remedy employment discrimination are commendable, and are useful in achieving equality of employment opportunity, they do not in themselves reflect the purpose of Title VII. The purpose of the Act is, as courts have repeatedly noted in the face of "good faith" defenses to Title VII actions, to end employment discrimination. *Rowe* v. *General Motors Corp., supra.*

Title VII brought with it radical changes in the way in which employers and bargaining representatives do busi-

ness. Seniority systems, employment selection devices, nepotism agreements, weightlifting requirements and a host of other employment practices have yielded to the statute's demand for equality of treatment. Petitioners have suggested no valid reason why the principle of majoritarian rule embodied in Section 9 of the N.L.R.A. should not, *only to the extent it must,* also yield to that demand. The principle has in the past yielded to this Court's insistance that bargaining units fairly represent all its employees. *Steele* v. *Louisville and Nashville Railroad Co.,* 323 U.S. 192. Petitioners cite nothing to indicate that Title VII rights are any less important than the duty of fair representation.

Certainly the Board's functions are made more complicated by Title VII's existence, but the statute is there, and its provisions as relate to the facts of this case are plain. The Board must not ignore them, as it did in reaching its decision in this case. It would be anamolous indeed if the Board, which is itself required to heed § 717 of Title VII when it makes internal employment decisions, were allowed to ignore the statute when it reviews the employment decisions of private employers and bargaining representatives. The principle of majority rule has not been undercut by the principle of fair representation; neither will it be undercut by reference to § 704(a).

CONCLUSION

For the above and foregoing reasons, and for the reasons set forth in the brief of Respondents, the decision of the court below should be affirmed.

Respectfully submitted

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Nos. 73-696 and 73-830

IN THE

Supreme Court of the United States

October Term, 1974

The Emporium Capwell Co., Petitioner

v.

Western Addition Community Organization, et al.

National Labor Relations Board, Petitioner

v.

Western Addition Community Organization, et al.

On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE WAYNE STATE UNIVERSITY CLINICAL LAW PROGRAM IN EMPLOYMENT DISCRIMINATION

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IN THE

Supreme Court of the United States

October Term, 1974

The Emporium Capwell Co., Petitioner

v.

Western Addition Community Organization, et al.

National Labor Relations Board, Petitioner

v.

Western Addition Community Organization, et al.

On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION TO FILE OUT OF TIME AND BRIEF AMICUS CURIAE OF THE WAYNE STATE UNIVERSITY CLINICAL LAW PROGRAM IN EMPLOYMENT DISCRIMINATION

MOTION TO FILE OUT OF TIME

The Wayne State University Clinical Law Program hereby moves to file its brief *amicus curiae instanter*. The Program had previously received the concurrence of all parties to file its brief *amicus curiae* in accordance with Court Rule 42. (Copies of the authorizations have been filed with the Clerk). Its brief was originally due August 13, 1974, the date Respondent's brief was due. Attorneys for all parties have been contacted and none objects to the granting of this motion.

The Wayne State University Clinical Law Program in Employment Discrimination is a publicly funded part of the Wayne State University Law School and is charged with the duty of assisting the private bar and aggrieved persons to eliminate employment discrimination through all lawful means. Its experience has shown that no avenue of lawful redress should be limited, except under the most compelling circumstances, if the constitutional and congressional promises of non-discrimination in employment are to be successfully met. The Board decision herein needlessly narrows employee rights to oppose unlawful racial discrimination and thus hampers all efforts to end such discrimination.

BRIEF OF AMICUS CURIAE

STATEMENT OF THE FACTS

Almost six years ago, in November, 1968, Hollins, a temporary supervisor, and Hawkins, a stock clerk, were discharged by the Emporium-Capwell Company for peacefully distributing leaflets to the public during store hours, on the public sidewalk adjoining the store, on their own time.[1] The leaflets urged a public boycott of the store as a protest[2]

[1] App. pp. 21-31 (testimony of Hawkins on direct examination). "App." refers to the appendix to the briefs in the court below. A copy has been filed with the clerk.

The discharge letter read: "You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9th, 1968 in front of the Emporium, 835 Market Street, S. F. pursuant to written warning dated November 2, 1968." App. 31.

[2] App. 196, 198.

against its allegedly discriminatory employment practices.[3] Before discharging them, the company issued a written warning that they would be discharged should they repeat

[3] Statistics introduced at the Board hearing showed the following distribution of employees at the Emporium-Capwell Company stores in 1968:

	ALL EMPLOYEES			MINORITY GROUP EMPLOYEES							
				Male				Female			
Job Categories	Total (Col. 2+3)	Male	Female	Negro	Oriental [2]	American Indian [2]	Spanish Surnamed American [2]	Negro	Oriental [2]	American Indian [2]	Spanish Surnamed American
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Official and managers	1145	538	607	10	9		18	10	11		9
Professionals	66	27	39		1		3				
Technicians	20	20			1						
Sales Workers	2898	332	2566	11	7		14	102	47		105
Office and clerical	827	30	797	6	3			36	59		57
Craftsman (Skilled)	76	75	1	1			1				
Operatives (Semi-Skilled)	143	64	79	1	3		5	6	5		5
Laborer (Un-Skilled)	372	201	171	24	7		25	16	9	1	22
Service Workers	632	227	405	23	10		51	37	23	-	37
Total	6179	1514	4665	76	41		117	207	154	1	235

App. 230

the incident,[4] and waited until they actually did repeat the same activity before discharging them.

The protest is traceable to a written survey which the two employees helped to organize and conduct.[5] In addition to the survey, a seven-item questionnaire[6] which was distributed to minority employees, they compiled case studies on several employees who had alleged employer discrimination.[7] They concluded that there was a general feeling among all the "black, brown, yellow, and red" employees that their employer was treating them in a discriminatory manner,[8] and submitted grievances to the union. They informed the union before it presented their grievance to the adjustment board that theirs was a class grievance regarding the company's treatment of employees of all

[4] App. 199. The warning also cautioned them not to hold press conferences to discuss the alleged racial discrimination.

[5] App. 36-38, 91-92 (testimony of Hawkins and Hollins, respectively).

[6] "(1) How long have you worked at the Emporium?

"(2) Have you ever been offered a promotion? (Taking supervisor test, Training program, etc.)

"(3) How many times have you been to Personnel? (For complaints, working conditions or insubordination.)

"(4) Who is your supervisor? How many have you had since you've been working?

"(5) What is your present rate of pay? Have you ever gotten a merit raise?

"(6) Is your department a fast or slow moving dept., as far as raises or promotions?

"(7) Are you presently pleased with your job? (Or would you like to be trained or promoted?)"

App. 174.

[7] App. 168-87.

[8] App. 38-39, 91-92 (testimony of Hawkins and Hollins, respectively).

minority races and national origins, and not a set of individual complaints.[9] The union, however, refused to process the grievance as the employees had requested. Instead, the union offered to remedy the situation by conducting an independent hearing before a joint industry-union adjustment board on behalf of each potential grievant.[10] Union secretary-treasurer Johnson may have intended to do well by the protestors, but his attitude was essentially unresponsive. His offer on behalf of the union to dispose of the grievance on a case-by-case basis was rejected by the employees as an unacceptable prolongation of discriminatory terms of employment for most of the affected employees.[11] They therefore refused to testify as individual complainants before the adjustment board.[12] They did not take any independent action until they had received explicit assurance from union secretary Johnson that "individuals could take whatever action they wanted to as long as it is legal."[13] Thereafter Hollins attempted to discuss with the company president "things that were happening among minority employees at the store,"[14] but the president referred him to the personnel director, to whom Hollins had already spoken.[15] Shortly thereafter Hawkins and Hollins called a press conference, at which they accused the com-

[9] App. 47-48, 125-26 (testimony of Hawkins and Hollins, respectively, on cross examination). App. 137-38 (testimony of Johnson, Secretary-Treasurer, Local 1100, Department Store Employees Union).

[10] See App. 136 (testimony of Johnson).

[11] App. 49 (testimony of Hawkins).

[12] App. 49, 114 (testimony of Hawkins and Hollins, respectively).

[13] App. 146 (testimony of Johnson).

[14] App. 121 (testimony of Hollins).

[15] App. 122 (testimony of Hollins).

pany of racially discriminatory practices, revealed their intention to urge a boycott, and read the handbill they into the adjustment board that theirs was a class grievance tended to distribute.[16] The company issued a warning letter to Hollins which contained a reference to this press conference as well as to the handbilling,[17] but the discharge letters[18] and Hawkins' warning[19] referred only to the handbilling. Referred by their employer to a management official whom they apparently felt was unsympathetic to their concerns, and bound by their union to a grievance procedure which they felt was not responsive to the problem, the employees believed that they were left with only one simple and expeditious solution: public protest. They conducted their protest by distributing leaflets on the public sidewalk, without blocking store entrances, without harassing or intimidating customers, without violence, and on their own time. They followed the union's advice that individual action was permissible; nowhere did their literature indicate their status either as union members or as employees.[20]

At no point did the union disapprove or disavow the protesters' activities. To the contrary, the union indicated only that it felt that it had a contractual obligation not to picket or boycott the employer.[21] When union secretary

[16] App. 17-18, 20-21, 81-83 (testimony of Hawkins and Hollins, respectively).

[17] 485 F.2d 923 n.17.

[18] See note 1, *supra*.

[19] App. 197.

[20] The first leaflets were distributed in the name of the Western Addition Community Organization, App. 196, while the second batch of leaflets was unsigned. App. 198.

[21] App. 146 (testimony of Johnson).

Johnson was asked, "Did you advise the employees that they should follow the union procedure set forth in the contract?" he replied, "I said that if they wanted some longlasting effect that they should follow the union's procedure and I wasn't going to engage in any drama, however, if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals."[22] After Hollins and Hawkins were discharged, the union promptly filed a grievance on their behalf.[23] In fact, the union has filed a brief *amicus curiae* with this Court in support of the protesters.

SUMMARY OF ARGUMENT

The elimination of racial discrimination in employment is an integral part of this nation's over-all labor policy and has been considered by the Board and the courts as a matter of "highest priority."

The two discharged employees here were attempting to present a group grievance challenging employment practices which they justifiably and in good faith believed violated federal statutes and their collective bargaining agreement. Such a group grievance is explicitly permitted by the proviso to §9(a) of the National Labor Relations Act, even when an exclusive bargaining agent exists. Congress has recognized in §704 of the 1964 Civil Rights Act that

[22] App. 149 (testimony of Johnson). Had the union itself engaged in handbilling, it technically would not have been violating the collective bargaining agreement since the agreement contained no antipicketing clause. Both the union and the Board, however, believed that union picketing would have violated the spirit of the collective bargaining agreement.

[23] App. 138 (testimony of Johnson).

enlisting public support for such grievances through peaceful picketing should ordinarily be protected; no provision of the National Labor Relations Act withdraws that protection when a grievance is involved.

The employer was not obligated to deal with the employees engaged in the peaceful protest, but it had several realistic alternatives had it chosen to do so.

ARGUMENT

SECTIONS 7 AND 9(a) OF THE NATIONAL LABOR RELATIONS ACT PERMIT THE NONDISRUPTIVE EFFORTS OF UNIONIZED EMPLOYEES TO ENLIST PUBLIC SUPPORT FOR A GRIEVANCE AGAINST THEIR EMPLOYER ALLEGING RACIALLY DISCRIMINATORY EMPLOYMENT PRACTICES.

Hawkins and Hollins were discharged solely for "distribution of 'Boycott Emporium' literature"[24] in front of their employer's store, peacefully, on the public sidewalk, on their own time, without blocking entrances, harassing customers, or disparaging their employer's goods. The handbills which they distributed attacked the Emporium's alleged unlawful racially discriminatory employment practices (specifically its promotion policies) and urged "our people to take their money out of this racist store." The handbills did not advise or encourage fellow employees to take any action, and no work stoppage occurred.

The parties agree that Hawkins and Hollins were acting in good faith. The evidence introduced at the Board hear-

[24] The discharge slips give the handbilling as the only basis for either discharge. The warning notices also threatened discharge for issuing public statements at press conferences or for "mak[ing] any similar public statement." App. 189, 197.

ing (n. 3, *supra)* demonstrated that their beliefs were well founded; indeed, the evidence presents a *prima facie* case of employment discrimination.[25] No one contends that Hawkins' and Hollins' protest activities interfered with their work. And the record demonstrates that they did not distribute boycott handbills until nearly seven months after they first began to work through their union and the contractual grievance machinery to challenge the Emporium's treatment of blacks.

It seems clear that had Hawkins and Hollins not been Emporium employees, but strangers peacefully distributing the very same leaflets in the same manner and in the same public place, they would have been wholly free to continue their activities. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *cf. Talley* v. *California*, 362 U.S. 60. See also *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 313. Hawkins and Hollins would thus have been subject to no sanctions other than potential liability for libel. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53.

It also seems evident that if Emporium employees had *not* been represented by a union, Hawkins and Hollins would have been protected against discharge for their

[25] *Associated General Contractors* v. *Altshuler*, 361 F.Supp. 1293, 1299(D. Mass 1973), *affd*, 490 F.2d 9, 18 n.15 (1st Cir. 1973), *cert. denied*, — U.S. — (1974); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 411 U.S. 1116; *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954.

activities by §7[26] of the National Labor Relations Act. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9; *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.*, 349 F. 2d 1, 4 (9th Cir. 1965); *Washington State Service Employees State Council No. 18*, 188 N.L.R.B. 957, 958-959 (1971). In addition, they would have been protected by §704(a) of Title VII, Civil Rights Act of 1964.[27] Unlike a parallel section of the National Labor Relations Act,[28] which merely protects individuals from retaliatory discipline for using or assisting the administrative mechanisms of that Act, §704(a) also protects employees who have "opposed any practice made an unlawful employment practice" by Title VII. *Pettway* v. *American*

[26] Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. § 157 (1970).

[27] Section 704(a) reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees *because he has opposed any practice made an unlawful employment practice by this title*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." (Emphasis supplied.)

42 U.S.C. §2000e-3(a) (1970).

[28] Section 8(a)(4) provides:

> "(a) It shall be an unfair labor practice for an employer . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

29 U.S.C. §158(a)(4).

Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).[29] While judicial interpretation of §704(a) has been sparse, the Equal Employment Opportunity Commission[30] has held that an "employee has a statutory right under [§704(a)] to oppose, without retaliation, any unlawful employment practices of his employer," and that such opposition may be manifested by peaceful employee picketing. EEOC Dec. No. 71-1804, 1973 CCH EEOC Decisions ¶6264, at 4468 (April 19, 1971). *Cf. Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *vacated on other grounds*, 411 U.S. 792 (1973). The wording of §704(a) is unambiguous; there is not the slightest hint that its broad protection does not extend to effective methods of opposing an employer's unlawful discriminatory practices including publicity and peaceful attempts to attract consumer support.

Moreover, had Hollins and Hawkins been supervisors, and thus not protected by §7 of the National Labor Relations Act, they nevertheless would have been protected by §704(a) against discharge for their press conference and leafletting. These were activities opposing the Emporium's allegedly discriminatory practices within the meaning of §704(a); that section's protection is not limited

[29] The *Pettway* court wrote:

> "The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act in that, in addition to protecting charges and testimony, Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices." 411 F.2d at 1006, n. 18.

[30] The EEOC has primary administrative responsibilities under Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34.

to nonsupervisory employees, but extends to all employees.[31] *See* §701(f), 42 U.S.C. 2000e-(f) (1970).

Thus, while strangers, supervisory personnel, and nonunionized employees engaged in good faith peaceful public protest against the Emporium's racially discriminatory employment practices are statutorily protected against the Emporium's retaliation, the Board majority condones the discharge of Hawkins and Hollins solely because they belong to a group of employees represented by a collective bargaining agent. We contend that nothing in the National Labor Relations Act or in its underlying premises warrants so harsh and anomalous a result. This is not to say that the Board is now obligated to enforce provisions of Title VII. Rather, as this Court has recently observed, "[i]t is the Board's function to strike a balance among conflicting legitimate interests which will 'effectuate national labor policy'. . .". *NLRB* v. *Magnavox Co.*, — U.S. —, 39 L. Ed. 2d 358, 362, 94 S. Ct. 1099. In the present case, the Board can effectuate the national labor policy expressed in §§7 and 704(a) without damaging the national labor policy of exclusivity reflected in §9(a).[32] We will show below that

[31] Had Hawkins and Hollins been engaged in the identical protest against their union they would also have been protected by §704 (a); §704(a) protects union members from retaliation by labor organizations for opposing unlawful employment practices.

[32] Section 9(a), 29 U.S.C. §159(a), provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and

(*continued on next page*)

even if peaceful employee handbilling directed at an employer's discriminatory employment practice creates tensions, the two policies are reconcilable. This case, especially, does not require the subordination of one to the other because in this case there is no conflict between the right to protest and the principle of exclusivity. Nor does granting unionized employees the same protest rights as strangers, supervisory personnel, and nonunionized employees endanger orderly collective bargaining.

This Court has often emphasized that the elimination of racial discrimination vindicates "a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402. And in *Alexander* v. *Gardner-Denver Co.*,—U.S.—, 39 L. Ed 2d 147, 160, 94 S. Ct. 1011, this Court has said, "Title VII strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." Elsewhere, this Court has observed that the Constitution embodies a national promise that blacks will be free from racial discrimination in such fundamental rights as the right to contract, which necessarily includes the right to contract one's labor. *Civil Rights Cases*, 109 U.S. 3, 32; *id.* 35 (Harlan, J., dissenting); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443.

In the light of these constitutional and congressional priorities, this Court and lower courts, as well as the Board, have repeatedly held that the elimination of dis-

(*continued from preceding page*)

> to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

criminatory employment practices is a fundamental goal of national labor policy which takes precedence over general principles of labor law. *Alexander* v. *Gardner-Denver Corp., supra; Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429; *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 208-209 (Murphy, J. concurring); *National Labor Relations Board* v. *Mansion House Center Management Co.,* 473 F.2d 471 (8th Cir. 1973); *United Packinghouse Workers* v. *NLRB,* 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied sub nom., Farmers' Cooperative Compress* v. *United Packinghouse Workers,* 396 U.S. 903; *United Rubber Workers* v. *NLRB,* 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837; *Bekins Moving & Storage Co. of Florida, Inc.,* 211 N.L.R.B. No. 7 (1974); *Hughes Tool Co.,* 147 N.L.R.B 1573, 1574-75 (1964); *Pioneer Bits Co.,* 140 N.L.R.B. 54 (1962). See also *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800. *Cf.* appellate court decisions interpreting Title VII as modifying collective bargaining principles; *e.g., Norman* v. *Missouri Pacific R.R. Co.,* 414 F.2d 73 (8th Cir. 1969); *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971); *Marlowe* v. *General Motors Corp.,* 489 F.2d 1057 (6th Cir. 1973).

Indeed, Congress is now so deeply committed to the elimination of racial discrimination that on several occasions during the past decade it has refused to limit individuals to any one forum or statute for the redress of discriminatory employment practices. See *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 11 n. 9. Nonetheless, even the available statutory and administrative mechanisms have been insufficient:

> "The mechanisms created by Title VII alone cannot handle the dimensions of the problem. In FY 1972 the EEOC received 38,840 complaints; it expects 45,000 new complaints during the next fiscal year. The growing backlog of cases is now 53,410, of which 43,101 are pending investigation. Conciliation, enforcement and litigation against employment discrimination cannot receive EEOC priority in such a situation." U.S. Comm'n on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* 3-4 (1973).

Enforcement of Title VII through the courts is now estimated to require total elapsed time of more than three years.[33] Note, *Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination,* 72 MICH. L. REV. 313, 320 n. 47 (1973). This delay has lead one commentator to observe:

> "Delay in obtaining reinstatement, back pay, or other affirmative relief in a case involving discharge or discriminatory hiring and promotion practices may seriously impair the value of the federal remedy." *Id.* 320.

In addition to significant delays, Title VII's mechanisms are inadequate for another reason: the employee may be unaware of it. A union member's first instinct is to turn to his union for relief, just as Hollins and Hawkins did in this case.[34]

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[33] The great difficulty experienced by employees in obtaining counsel for Title VII litigation has been deplored by several courts. See *H. Kessler & Co.* v. *EEOC,* 472 F.2d 1147 (5th Cir. 1973) (*en banc*), *cert. denied,* 412 U.S. 939, and cases cited therein.

[34] Courts have recognized that employees are most likely to depend on procedures with which they are most familiar. "It is under-

(*continued on next page*)

Traditional labor remedies have also been unsuccessful. Certainly the employer cannot be relied on to bring his own unlawful behavior before the Board, and the union may discharge its obligations by refusing to process even a meritorious grievance.[35] As one scholar has concluded, "[s]uits to enforce the union's duty of fair representation, which can be brought before the N.L.R.B. and the courts,

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(*continued from preceding page*)

standable that any union member would first proceed to raise any rights he felt were due him under the contract" before seeking judicial or administrative relief. *Dewey* v. *Reynolds Metal Co.*, 291 F. Supp. 786, §789 (W.D. Mich. 1968), *rev'd on other grounds*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689. *Cf. Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888, 891-892 (5th Cir. 1970). This would have been especially true in 1968, when Title VII was relatively untried and unknown.

[35] One of the principal obstacles to the eradication of discrimination in employment has been the extremely narrow scope of the duty of fair representation as it is presently defined. Plaintiffs must prove hostile discrimination to establish a violation. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337; *Humphrey* v. *Moore*, 375 U.S. 335, 342, 348-51. Even more to the point here, "*a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious.*" *Vaca* v. *Sipes*, 386 U.S. 171, 194 (emphasis supplied). Thus a union concerned about tactical considerations may discharge its obligations to its minority members by perfunctory compliance with its statutory duty. If, as petitioners insist, compliance with the duty of fair representation as currently defined were allowed to act as a bar against employee protests, unions would be able "to control the scope, direction, pace, and degree of elimination of racial discrimination." 192 N.L.R.B. at 176 (Jenkins, dissenting). In this case, the Board refused to protect employee public protests against unlawful discrimination in part because the union took *some* action in their behalf, and therefore did not breach its statutory duty. Given the discrepancy between the union's limited statutory duty and the employer's obligation to end all traces of demonstrated racial discrimination, such a result is intolerable. Hence, at least until there is a redefinition of the union's duty of fair representation, courts and administrative agencies must vigilantly protect the rights of employees to bring such unlawful employment practices before the public, except under the most compelling circumstances.

and the various remedies created by the N.L.R.B. in response, have proven similarly ineffective." Gould, *Black Power in the Unions*, 79 YALE L. J. 46, 50 (1969) (footnote omitted; emphasis supplied). Nor has arbitration provided adequate relief. This Court based a recent decision in large part on its perception that arbitration under a collective bargaining agreement often subordinates the interests of the individual to the collective interests of the majority, "especially where a claim of racial discrimination is made." *Alexander* v. *Gardner-Denver Co.*, *supra*, slip opinion at 21 n.19.

In short, it has been extremely difficult for the victims of employment discrimination to obtain prompt relief through the established channels. Under such circumstances, it should be entirely proper under §7 to permit aggrieved employees to enlist public support through peaceful handbilling in support of their good faith grievances against their employer's discriminatory practices. This protection is compelled particularly because it supports, through constructive action, a principal goal of national labor policy—the eradication of racially discriminatory employment practices.

The Board majority in this case asserts, in effect, that attempts to eliminate discrimination must be subordinated to the requirement that there be but one exclusive bargaining agent for any given group of employees. The Board cites §9(a) and 8(b)(7)[36] of the National Labor Relations

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[36] Section 8(b)(7), 29 U.S.C. §158(b)(7), provides:

> . . . "It shall be an unfair labor practice for a labor organization to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or

(*continued on next page*)

Act as its statutory support and relies on *dictum* in *National Labor Relations Board* v. *Allis-Chalmers Mfg.*, 388 U.S. 175, 180, a §8(a)(1) case, for a statement of the philosophy underlying these provisions. National labor policy, the Court stated in *Allis-Chalmers*,

> "has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."

In addition, exclusivity is said to promote orderly collective bargaining (1) by preventing the employer from negotiating with union dissidents and thereby exploiting differences in the bargaining unit, and (2) by preventing an employer from being caught between the conflicting demands of groups of employees. We contend that the circumstances of this case neither require the invocation of exclusivity nor serve its underlying purposes.

Peaceful public protest against racial discrimination, conducted on the employees' own time, without disrupting the employment relationship between the Emporium and any of its employees, is not a type of activity which vio-

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> forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> "(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title . . . ."

lates §9(a).[37] The typical §9(a) violation involves a wildcat strike called during negotiations between the employer and the union for a new collective bargaining agreement by employees who are unhappy with the progress of negotiations. Virtually every decision cited by the Board involved either such a strike or an attempt by the employer to circumvent the collective bargaining agent. See, *e.g.*, *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir., 1970) (wildcat strike to protest unsubstantiated discharge of employee for pilferage); *National Labor Relations Board* v. *Sunbeam Lighting Co*, 318 F.2d 661 (7th Cir. 1963) (wildcat called after employees learned terms of employer's final offer informally, before union could present it for a vote); *Harnischfeger Corp.* v. *NLRB*, 207 F.2d 575 (7th Cir. 1953) (wildcat called to put pressure on the union bargaining committee during negotiations); *National Labor Relations Board* v. *Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) (wildcat called during contract negotiations, in which strikers demanded retroactive wage increase as condition of returning to work); *Western Cartridge Co.* v. *NLRB*, 139 F.2d 855 (7th Cir. 1944) (wildcat strike called by employee group which had been negotiating independently of the union regarding

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[37] Nor does it violate §8(b)(7), since theirs was not recognitional picketing. See *Moss American, Inc.*, 178 N.L.R.B. 189 (1969). The question of whether the protesting employee here constituted a "labor organization" was not litigated. However, it is likely that Hollins and Hawkins did not consider themselves representatives of an organization. They *did* consider themselves representatives of a *class* of minority employees, and wanted to present a grievance as representatives of that class. Section 9(a) explictly provides that a "group of employees" may present grievances. There is nothing to indicate that Hawkins and Hollins picketed for any other purpose. We agree with respondents and the lower court, however, that if Hawkins' and Hollins' activities are considered "bargaining," both §9(a) and §8(b)(7) must be construed in the light of the compelling national interest in protecting protests against race discrimination.

grievances). See also *Medo Photo Supply Corp* v. *NLRB*, 321 U.S. 678 (employer bargaining without presence of bargaining agent). The rule which can be drawn from the cases on which the Board relies, then, is that these unauthorized *strikes* are not protected by §7, because they interfere with the bargaining responsibilities of the exclusive representative and because a strike—unlike peaceful handbilling directed at consumers—is inherently disruptive of the relationship between employer and employees.

The distinction between the type of activity in derogation of the collective bargaining agent normally associated with §9(a) violations and the peaceful handbilling of consumers in this case is apparent. Hollins and Hawkins justifiably believed the employer was failing to live up to Title VII and to the contractual provision forbidding discriminatory employment practices,[38] and were demanding an immediate end to the asserted breach of contract and law. They were not attempting to fashion future terms and conditions of employment, but to require the Emporium to honor its existing contractual and legal obligations not to discriminate.[39] Indeed, had the union here pursued the

[38] Section 21(e) of the union contract forbids discrimination by the employer:

> "No person shall be discriminated against in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age or sex." App. 205.

[39] "There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an agreement but simply to urge Respondent to take action to correct conditions of racial discrimination which the employees reasonably believed existed at the Emporium."

192 N.L.R.B. at 178-79 (Brown, dissenting.)

identical claims—whether on an individual basis, as it insisted or on behalf of all minority employees, as Hawkins and Hollins wished—it would have been engaged in grievance resolution, not bargaining.

The Board's redefinition of bargaining in the present case to include handbilling which had the object of putting public pressure on the employer to honor its contractual and legal obligations to end discriminatory employment practices is an unwarranted extension of the meaning of "bargaining." "Bargaining" has heretofore been defined under the National Labor Relations Act as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." NLRA §8(d).[40] This statutory definition cannot be interpreted to include attempts by employees to enlist public pressure in support of their grievances against the employer's racially discriminatory employment practices. Employers cannot make nondiscriminatory personnel policies a term or condition of employment any more than they can make their other legal obligations conditions of employment:

[40] Section 8(d), 29 U.S.C. §158(d), provides in pertinent part:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

> "Of necessity the rights conferred by Title VII can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 14-15.

Hollins' and Hawkins' attempts to exert economic pressure on their employer to end the Emporium's unlawful practices therefore cannot be deemed an attempt to bargain.[41]

Hawkins' and Hollins' activities, rather, were an integral part of an attempt to settle a grievance against discriminatory practices which they justifiably believed violated their contract and the law. *See* first proviso to §9(a), note 31, *supra.*[42] They attempted to have their union and em-

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[41] The board and the appellate court accepted the trial examiner's characterization of the issue in this case as involving the alleged right of individual employees to "bargain" with their employer regarding the terms and conditions of employment in derogation of the designated bargaining representative. We submit that the trial examiner erred. He failed to recognize that §9(a) explicitly provides that "a *group* of employees shall have the right at any time to present grievances." See *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203. The trial examiner's conclusion not only forces an unnecessary confrontation between §7 and §9(a), but should be struck down as unsupported by substantial evidence. See *National Labor Relations Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 112-113; *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 290-292.

[42] The proviso to §9(a), distinguishes grievances from bargaining:

> "[C]ollective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from 'grievances', which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected. These claims may involve no question of the meaning and scope of the bargain, but

(*continued on next page*)

ployer resolve their grievance, which alleged race discrimination against a class consisting of all the Emporium's minority employees, particularly blacks.[43]

After about six months they became convinced that resolving the grievances in the manner insisted upon by the union would not provide adequate relief to the class for which they were grieving. Their belief was amply justified: it is now well recognized that systemic discrimination cannot be successfully rooted out by isolated and insular attacks on individual complaints. As one court stated in a slightly different context:

> "[T]he underlying discriminatory attitude not only can, but appropriately should be decided as a

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(*continued from preceding page*)

> only some question of fact or conduct peculiar to the employees not affecting the unit." *Hughes Tool Co.* v. *NLRB*, 147 F.2d 69, 72-73 (5th Cir. 1945) (footnote omitted).

Accord, *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 722; *NLRB* v. *Associated Machines, Inc.*, 219 F.2d 433 (6th Cir. 1955). As to grievances, §9(a) does not give the bargaining representative

> "the *exclusive* right to handle them unless they really involve a bargaining for the unit, or an interpretation of the bargain. On the contrary it expressly gives such employee or group of employees the right to present their own grievances to the employer. The purpose is to preserve in each employee as a right this direct approach to the employer to secure full consideration of his case.[2]
>
> "[2] That Congress intended to preserve the right of employees to confer with the employer is further evidenced by the proviso in Section 8(2): 'Subject to rules and regulations made and published by the Board pursuant to Section 6 an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.'" *Hughes Tool Corp.* v. *NLRB*, 147 F.2d 69, 73 (5th Cir. 1945) (emphasis in original).

[43] As Member Jenkins noted in dissent, there is no reason "why a grievance may not pertain to a group rather than an individual complaint and accordingly be resolved on a group rather than an individual basis." 192 N.L.R.B. at 174.

class action since the 'evil sought to be ended is discrimination on the basis of a class characteristic.' Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968)." *Hecht* v. *Cooperative for American Relief,* 351 F. Supp. 305, 312-313 (S.D. N.Y. 1972).

Another court has noted:

> "While it is true that there are different factual questions with regards to different employees, it is also true that the 'Damoclian threat of a racially discriminatory policy hangs over the racial class." Hall v. Werthan Bag Corp., M.D. Tenn. 1966, 251 F. Supp. 184." *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122, 1124 (5th Cir. 1969).

Cf. Senate Comm. on Labor and Public Welfare, *Report No. 92-415,* 92d Cong., 1st Sess, 5 (1971). In short, many courts have agreed with Hollins and Hawkins that allegations of race discrimination must be treated as class allegations. While union and employer were not required to treat all race discrimination grievances as class grievances as a matter of law, it cannot be disputed that Hawkins and Hollins acted reasonably in believing that the union approach here would be inadequate.

Since their own approach to the Emporium to settle the grievances had been unfruitful, we contend that Hawkins and Hollins had a right to attempt to enlist consumer support to have the employer act on the grievance.[44] This

[44] This case meets the requirements imposed by the Court of Appeals in *NLRB* v. *Tanner Motor Livery, Ltd.,* 419 F.2d 216 (9th Cir.

(*continued on next page*)

right to peaceful public protest in support of a grievance arises out of a paramount public interest in the subject matter of their grievance—race discrimination. It is not a general right, but one which may properly be limited to employment discrimination grievances which the unionized protesters have previously brought before the union and the employer without success, and which, as here, are founded on a reasonable and good faith belief in the legitimacy of the claim.[45] *Cf. National Labor Relations Board* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 63 (because of the First Amendment, this Court does not ascribe to Congress a purpose to outlaw peaceful picketing unless there is the clearest indication in the legislative history).

(*Continued from preceding page*)

1969). In that case, the protesters lost the protection of §7 because the employees "had an obligation to go to the union with their desire for non-discriminatory hiring. The record does not demonstrate that they approached the union, nor does it indicate that the union gave its sanction to their actions." 419 F.2d at 221. Hollins and Hawkins, on the other hand, filed a grievance and worked with the union for more than half a year before they concluded that the union's approach would provide only token relief. Because Hawkins and Hollins met the *Tanner* requirements, the Court need not here determine whether these standards are correct.

Moore v. *Sunbeam Corp.,* 459 F.2d 811 (7th Cir. 1972) was decided erroneously. If a union's assertion that the employee's activities constituted violations of the no-strike clause is accepted, then it would be possible for unions to strip their members of their §§7 and 704 rights simply by asserting that such acts would be violative of the no-strike clause. But these rights cannot be waived. *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 14-15; see text at 21, *supra.*

[45] "The extent to which any individual employee's Section 7 rights will be limited by the needs of his collective bargaining unit has been the subject of case by case development." *NLRB* v. *Shop Rite Foods, Inc.,* 430 F.2d 786, 789 (5th Cir. 1970). The general rule is that picketing is lawful if it does not have an unlawful objective and is not conducted in an unlawful manner. *Hughes* v. *Superior Court of California,* 339 U.S. 460.

We have noted the statutory distinction between bargaining and the presentation of grievances in order to show that Congress recognized that there are legitimate exceptions to the need for exclusivity in labor relations. The proviso to §9 is one such exception, encompassing peaceful attempts by employees to resolve grievances against practices which violate significant statutory rights OR the collective bargaining agreement. This exception and its application to the facts of this case would not—contrary to the Board's fears—vitiate the underlying purpose of exclusivity. Nor does it place the employer in an intolerable dilemma. Under neither the NLRA nor Title VII was the Emporium required to deal with Hawkins and Hollins any more than it was required to deal with strangers, nonunionized employees, or supervisory personnel engaged in similar behavior. Neither statute places on the employer an affirmative burden. See *Broniman* v. *Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied*, 384 U.S. 907; *Black-Clawson Co.* v. *International Association of Machinists*, 313 F.2d 179, 184-85 (2d Cir. 1962). Sections 7 and 704(a) merely prohibit an employer from disciplining any unionized employee for engaging in good faith and reasonable public protest in support of their grievance against race discrimination.

True, the Emporium was subject to economic pressures as a result of the handbilling. But it had several realistic options short of discharging Hollins and Hawkins for their peaceful public protest.[46] The employer could have ignored their activities, as it might have ignored identical behavior

[46] We recognize that the Court need not address itself to the issues raised by the following discussion. We present it merely to demonstrate that no serious harm will come to either the employer or the collective bargaining process if employers are prohibited from discharging unionized employees engaged in the peaceful type of protest involved here.

by strangers. It could have released information to the public, giving its side of the dispute, as it might have done if nonunionized employees had been involved. Or it might have held discussions with the protesters, in the union's presence, as specifically authorized by the second proviso to §9(a).[47]

Should the Emporium have chosen this third option, it would not be unreasonable to require Hawkins and Hollins to refrain from their public activities during the course of discussions, as evidence of their good faith interest in resolving the problem. Assuming a good faith effort by the employer to resolve the grievance in this manner, there are three potential outcomes which could present problems: (1) The Emporium could conclude that there was no basis for the grievance, and refuse to take any remedial measures; (2) it could accept the union's counter-proposals, assuming a difference between the union position and that of the protesters; or (3) it could accept the protesters' proposals, again assuming a difference between the union's and protesters' positions. However, there are means of resolving each of these potential problems without restricting §7 rights or forcing the Emporium into an impossible position.

1. Should the Emporium conclude in good faith that the grievance was unfounded, it could be required to enlist the aid of the EEOC. Title VII even establishes special machinery for such contingencies. Section 705(g), 42 U.S.C. §2000e 4(g), provides:

"The Commission shall have the power—

• • • • •

[47] See note 32, *supra*.

"(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

"(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title . . . . "

Alternatively, the protesters' could be required to file a charge with the Board or the EEOC. The protesters should not, however, be required to refrain from resuming their public activities; such a requirement would not only allow the employer to determine by itself the scope of its employees' §7 rights, but would accord greater deference to the interests of the employer than to the public interest in hearing well-founded allegations of discrimination. A decision by the Board or the EEOC that the complaint was *without* foundation would assure that the allegations receive an impartial third party hearing and therefore would provide sufficient basis for requiring the employees to halt their public activities. Persistent picketing or leafletting after an adverse decision by the Board or the EEOC would be evidence of bad faith harassment and therefore would no longer be protected. The public has a vested interest in protecting the good faith efforts of employees to put pressure on their employer to end practices made unlawful by Title VII of the Civil Right Act, and this public interest outweighs the employer's economic interests. However, the public interest is represented if the complaint receives a hearing before an impartial public administrative

body. At that point, the individual protesters still retain their right to press their individual grievances through the courts, but the potentially disruptive effects of their activities are no longer outweighed by their public value. Persistent public accusations of discrimination after adverse administrative decision might well constitute disloyalty, so that the employees might be discharged for cause. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9.

2. Because the considerations are the same, the same result should obtain if the employer rejects the protesters' proposals in favor of different proposals submitted by the union. The protesters should retain their §7 rights until an independent decision is rendered by the Board or the EEOC.

3. If the employer should determine that the protesters' proposals offer a better means of meeting his obligation not to discriminate than do the union's proposals, an arbitrable dispute may arise. The union then has the right to press its grievance through the contractually established procedure.

In short, the employer is not faced with an insoluble dilemma if peaceful public handbilling by unionized employees in support of grievances protesting racial discrimination in employment is held to be protected by §7. Yet such handbilling may well increase the incentive for both the employer and the union[48] to accelerate the elimination of discriminatory practices voluntarily.

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[48] "Economic pressure may be one of the few viable means by which the unions can be impelled to share elected leadership positions with Negro workers and to involve themselves in the problems of the newly hired 'disadvantaged' worker. [O]ne must recognize that if the walkout and pickets do not succeed in the legitimate objectives, black workers may well seek another representative not part of the traditional union structure . . . . " Gould, *Black Power in the Unions*, 79 YALE L. J. 46, 77 (1969).

In sum, the Board had the opportunity here to accommodate both the national labor policy of protecting concerted activity protesting discrimination *and* the policy of exclusive representation. In the past, the Board has taken care to put the highest priority on the elimination of discrimination in employment.[49] Its failure to do so here was an abdication of its responsibility to strike a proper balance among legitimate national labor interests. Worse, its decision needlessly narrows employee rights to oppose discrimination made unlawful by Congress.[50]

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[49] The Board refuses to extend the protection of the contract bar rule to a union guilty of racial discrimination, *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962), will rescind certification of a union guilty of negotiating a discriminatory bargaining agreement, *Local 1* v. *Independent Metal Workers Union* (*Hughes Tool Co.*), 147 N.L.R.B. 1573 (1964), and has agreed to investigate alleged union discriminatory practices before certifying that union as the exclusive representative, *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. No. 7 (1974). A bargaining order issued against an employer who has refused to bargain with a union guilty of race discrimination will not be enforced. *National Labor Relations Board* v. *Mansion House Center Management Co.*, 473 F.2d 471 (8th Cir. 1973).

[50] As an arm of the federal government, the NLRB is forbidden by the Fifth Amendment to contribute its services to the maintenance of race discrimination. *Bolling* v. *Sharpe*, 347 U.S. 497; *Shelley* v. *Kraemer*, 334 U.S. 1; *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. No. 7 (1974). As Member Jenkins has stated:

> "The Board as an organ of the Government, by withdrawing its protection from these employees who are protesting racial discrimination, is breaching its constitutional and statutory obligation not to aid or permit such discrimination." 192 N.L.R.B. at 176-177.

CONCLUSION

For the reasons stated, the Court of Appeals should be instructed to remand this case to the Board for entry of a finding that the Emporium's discharge of Hawkins and Hollins violated §8(a)(1) and for entry of an order requiring their reinstatement with back pay.

Respectfully submitted,

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* We wish to thank Barbara Shaw, a Wayne State University Law School student, for her assistance in the preparation of this brief.

MOTION
JUL 29

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

against

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

against

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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Interest of the *Amicus Curiae* 5

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MOTION OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Statement

The National Retail Merchants Assocation, Inc. (hereinafter "NRMA") hereby seeks leave to file a brief as *amicus curiae,* pursuant to Rule 42 of the Rules of the

Supreme Court of the United States, in support of petitioners herein. Counsel for respondent and for both petitioners have granted written consent for the filing of this brief. However, because NRMA wished to supplement rather than duplicate any of the arguments made by either of petitioners, preparation of this brief had to await the filing of petitioners' briefs, thereby necessitating this motion.[1]

Interest of the *Amicus Curiae*

NRMA is a non-profit trade association with approximately 2,000 members operating more than 30,000 retail outlets throughout the United States. These stores range in size from small specialty shops to large full-line department stores, representing all aspects of general merchandise retailing. NRMA members employ more than two million people. Some but not most of these retail employees are represented by unions.

NRMA is in full agreement with petitioners that the unfair labor practice complaint in this case was properly dismissed by the National Labor Relations Board (hereinafter "NLRB" or "Board") because the two dissenting employees, by their bargaining demands and boycott activities, were acting in derogation of the union's statutory rights as exclusive bargaining representative. Nevertheless, NRMA is concerned lest a decision reversing the court below on this ground alone be misconstrued to suggest that retail employees not represented by a union would be free

1. Filed herewith are letters from counsel for all parties granting consent for the filing of this *amicus* brief. Since respondent has obtained an extension of time to August 13, 1974, for the filing of its brief, there can be no possible prejudice to respondent in the Court's granting the instant motion.

—while remaining on the payroll—to engage in such a flagrantly inciteful and disloyal attack upon their employer.

The court below acknowledged that the disloyal conduct of these employees could afford an independent basis for concluding that their activities were not legally protected. It also confirmed that this Court's decision in *NLRB* v. *Local Union No. 1229, IBEW* (*Jefferson Standard*), 346 U.S. 464 (1953), remained controlling on this question though the decision antedated enactment of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*). Nevertheless, the court declined to pass on the merits of the disloyalty issue, referring the matter to the Board for a determination on remand.

NRMA fully supports equal opportunity in employment, but shares the view of the court below that an allegation of job discrimination is not a license for employees to destroy the business of their employer. Indeed, it is certainly questionable whether such divisive conduct serves the interest of equal opportunity at all. In any event, it is submitted that the present availability of a broad range of legal remedies to investigate allegations of employment discrimination—and to eradicate discrimination found to exist—only reinforces the conclusion that such tactics as were employed here are not entitled to any special treatment under the Labor-Management Relations Act (hereinafter "Act"), 29 U.S.C. §150 *et seq.*

Thus, it is urged that in no event is a remand necessary in this case. On the basis of the principles which it first enunciated in *Jefferson Standard*, this Court should hold that the employees' conduct here was so injurious and dis-

loyal as to deprive them of the protection of Section 7 of the Act (29 U.S.C. §157).

In view of the foregoing, NRMA seeks leave to file the brief following hereafter.

Respectfully submitted,

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BRIEF OF NATIONAL RETAIL MERCHANTS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Interest of the *Amicus Curiae*

The interest of NRMA is set forth in its annexed motion for leave to file this *amicus* brief.

ARGUMENT

The vitriolic public attack and boycott campaign mounted by these employees against their employer, while continuing to draw full pay, constituted such flagrant disloyalty as to deprive them of the protection of Section 7 of the Act.

Writs of certiorari were granted to review a decision of the Court of Appeals for the District of Columbia Circuit (485 F.2d 917), which reversed and remanded a decision and order of the Board (192 NLRB 173), after hearing, dismissing an unfair labor practice complaint against The Emporium Capwell Co. The complaint had charged the employer with violating Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) by discharging two employees at its San Francisco department store, The Emporium, for refusing to halt a vitriolic public attack and boycott campaign conducted against their employer in their off-hours.[1]

1. On two successive Saturdays the employees picketed in front of The Emporium, distributing a handbill which read as follows:

"BEWARE EMPORIUM SHOPPERS—
BOYCOTT IS ON!!!

FOR YEARS AT THE EMPORIUM BLACK, BROWN, YELLOW AND RED PEOPLE, HAVE WORKED AT THE LOWEST JOBS, AT THE LOWEST LEVELS. TIME AND AGAIN WE HAVE SEEN INTELLIGENT HARD-WORKING BROTHERS AND SISTERS DENIED PROMOTIONS AND BASIC RESPECT.

THE EMPORIUM IS A 20TH CENTURY COLONIAL PLANTATION. THE BROTHERS AND SISTERS ARE BEING TREATED THE SAME WAY AS OUR BROTHERS ARE BEING TREATED IN THE SLAVE MINES OF SOUTH AFRICA.

WHENEVER THE RACIST PIG AT THE EMPORIUM INJURES OR HARMS A BLACK SISTER OR BROTHER, THEY INJURE AND INSULT ALL BLACK PEOPLE. THE EMPORIUM MUST PAY FOR THESE INSULTS. THEREFORE, WE ENCOURAGE ALL OF OUR PEOPLE TO TAKE THEIR MONEY OUT OF THIS RACIST STORE, UNTIL BLACK PEOPLE HAVE FULL EMPLOYMENT AND ARE PROMOTED JUSTLY THROUGHOUT THE EMPORIUM.

WE WELCOME THE SUPPORT OF OUR BROTHERS AND SISTERS FROM THE CHURCHES, UNION, SORORITIES, FRATERNITIES, SOCIAL CLUBS, AFRO-AMERICAN INSTITUTE, BLACK PANTHER PARTY, W.A.C.O. AND THE POOR PEOPLE'S INSTITUTE."

In dismissing the complaint, the NLRB rested on the findings and conclusions of its Trial Examiner that:

> "to extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement."

The Trial Examiner also found the "potential for injury considerable" from the dissenting employees' assault on their employer's reputation (192 NLRB at 185). But in view of his ruling based on the exclusivity doctrine, he found it unnecessary to expressly decide whether the invective and incitation to boycott amounted to such grave disloyalty as to furnish an independent legal basis for the employees' discharge.

The Court of Appeals similarly side-stepped the question of disloyalty. Since the court was remanding the case for reconsideration on the exclusivity issue, it instructed the NLRB to also decide, on remand, whether the means used by these employees were so disloyal—under the test laid down by this Court in *NLRB* v. *Local Union No. 1229, IBEW* (*Jefferson Standard*), 346 U.S. 464 (1953)—as to remove them from the Act's protection. NRMA respectfully submits that—as this Court concluded in *Jefferson Standard* itself—there is no need to "remand this cause to the Board for further specificity of findings" (346 U.S. at 477); the record below amply supports the conclusion that the means chosen by these employees to register their protest were not protected.

A. The *Jefferson Standard* "Disloyalty" Test

In *Jefferson Standard*, a group of technicians employed by a television broadcasting company initiated a public campaign sharply criticizing their employer's programming and business policies as a device to exact concessions from their employer in collective bargaining. Confining the picketing to their off-hours and continuing to draw full pay, the technicians distributed thousands of handbills in front of the broadcasting company's premises charging it with a failure to provide local programming, thereby treating the city as "second class." Reasoning that there is "no more elemental cause for discharge of an employee than disloyalty to his employer", this Court sustained the ensuing discharges notwithstanding the contention that the employees were engaged in concerted activities within the scope of Section 7 of the Act. 346 U.S. at 472.

The Court pointed to several specific elements which compelled the conclusion that the actions of these employees were so disloyal as to deprive them of the protection of Section 7:

First, this was a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 346 U.S. at 471.

Second, the attack was carried out while the employees remained on the payroll and were thus under a specific obligation to maintain their loyalty. As the Court observed:

> "It was a continuing attack initiated while off-duty, upon the very interests which the attackers were paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities." 346 U.S. at 476.
>
> • • •
>
> " 'An employee can not work and strike at the same time.... He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business.' " 346 U.S. at 476 n.12 (quoting *Hoover Co.* v. *NLRB*, 191 F.2d 380, 389 (6th Cir. 1951)).

Such an attack upon an employer by non-striking employees not only violates the employees' contractual duty to be loyal to "their common enterprise", but also has the effect of undermining "industrial plant discipline" necessary for industrial stability. 346 U.S. at 474.

Finally, while the Board had reserved the question of whether the technicians' attack upon their employer would have been protected had it been made in the context of a conventional appeal for public support in a labor dispute, this Court met that issue head-on. The Court held that:

> "Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in §7, the *means* used by the technicians in conducting the attack have deprived the attackers of the protection of that section. . . ." 346 U.S. at 477, 478 (emphasis supplied).

This Court's analysis in *Jefferson Standard* was subsequently applied by the NLRB to sustain the discharge of employees who carried out a public campaign of product disparagement while engaging in a strike. In *The Patterson-Sargent Co.*, 115 NLRB 1627 (1956), employees of a paint manufacturer had distributed handbills to customers suggesting that paint manufactured during the strike by persons other than the manufacturer's regular employees might be of inferior quality and thus might "peal, crack, blister [or] scale." 115 NLRB at 1628.

The NLRB acknowledged that the case was factually distinguishable from *Jefferson Standard* in that Patterson-Sargent's employees were out on strike at the time of the protest, and the handbills distributed to the public expressly solicited support in connection with the pending labor dispute. Nevertheless, relying on "the same broad principle" as had been established in *Jefferson Standard*, the Board ruled that "by the means employed here in the preparation and circulation of the handbills the strikers for-

feited any right they may have otherwise had to the protection of the Act." 115 NLRB at 1630.

Patterson-Sargent confirmed that employees are required to meet a certain standard of loyalty even while they are on strike and even though they disclose to the public the true purpose of their boycott campaign. Moreover, although employees may not be held to the same standard of loyalty while they are on strike as that required of them while they are working and drawing full pay, the Board found the mere disparagement of the employer's product sufficiently disloyal to justify discharge. By comparison to the protesters' actions in *Jefferson Standard* and *Patterson-Sargent*, the public attack by the employees in the instant case—while they remained on the payroll—was far more flagrant and intemperate and far more likely to cause permanent harm to the employer's reputation and business.

B. Other Unprotected Concerted Activities

Both *Jefferson Standard* and *Patterson-Sargent* involved activities characterized as "product disparagement." It is clear, however, that this is not the only form of "disloyalty" which takes concerted action outside of the Act's protection. Section 7 does not afford employees an unrestricted license to attack the character or reputation of their employer—even during the course of a labor controversy. While employers are required to tolerate a certain degree of verbal "animal exuberance" by strikers or at the collective bargaining table (*see, e.g., Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)), they may lawfully discharge employees whose

disloyalty or disrespect renders them unfit for further service.

Thus, for example, in *NLRB* v. *Blue Bell, Inc.*, 219 F.2d 796 (5th Cir. 1955), the Circuit Court sustained the discharge of an employee who published a letter incident to a union election campaign calling one of the employer's officers a "liar" and charging him with "an obvious contempt for the truth." The court reasoned that:

> "An employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer. An employee may be lawfully discharged because of what he or she says or does in the course of a union organizing campaign if such conduct exceeds the bounds of legitimate campaign propaganda or is so disrespectful of the employer as seriously to impair the maintenance of discipline and thus render the employee unfit for further service." 219 F.2d at 798.

As noted earlier, this Court similarly recognized "the importance of enforcing industrial plant discipline and of maintaining loyalty" in upholding the discharges in *Jefferson Standard*. 346 U.S. at 474. *See also Maryland Drydock Co.* v. *NLRB*, 183 F.2d 538 (4th Cir. 1950); *NLRB* v. *Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972); *E. A. Laboratories, Inc.*, 88 NLRB 673 (1950); *Bettcher Mfg. Co.*, 76 NLRB 526 (1948).

Moreover, "disloyalty" itself is but one of a number of grounds upon which employers may discharge or discipline employees engaging in concerted activities. Thus, sit-down strikes, "quickie" strikes, slowdowns and strikes in violation of collective bargaining agreements are not protected "means" of protest though they be part and parcel of concerted action within the scope of Section 7. *See, e.g., NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 (1953); *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB* v. *Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965); *Elk Lumber Co.*, 91 NLRB 333 (1950). Similarly, trespass, destruction of property and violence may be proper cause for discharge though they occur during a labor dispute. *See, e.g., NLRB* v. *Clearfield Cheese Co.*, 213 F.2d 70 (3rd Cir. 1954); *Stewart Die Casting Corp.* v. *NLRB*, 114 F.2d 849 (7th Cir. 1940), *cert. denied*, 312 U.S. 680 (1940).

C. The Instant Case

Notwithstanding the fact that the employees' protest in the instant case related to alleged racial discrimination, the court below acknowledged that *Jefferson Standard* remained controlling on the disloyalty issue though it antedated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*). *Cf. McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Indeed, the court expressly noted that under both the Labor Management Relations Act and Title VII "an employee may be properly discharged for engaging in disloyal conduct if that is the real cause of the discharge." 485 F.2d at 932 n.45. Of course, any discharge which was "racially motivated" or "due solely to the employer's objection against lawfully protesting his allegedly discriminatory employment practices" would be an unfair labor practice. 485 F.2d at 932 (citing *United Packinghouse Workers Union* v. *NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969) and *NLRB* v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).

Although the court below thus concluded that the applicable legal principles had not been changed by enactment of Title VII, it refused to pass on the merits of the disloyalty issue—remanding for further findings. Yet, under its own analysis, a remand for further findings was unnecessary. The Trial Examiner had made extensive findings with respect to the disloyalty issue, and the hearing record was wholly devoid of any evidence showing or tending to show that the discharge of the two employees was racially motivated or was founded upon the employer's objection to a lawful protest. To the contrary, the evidence was undisputed that the employer discharged the two employees because of their refusal to heed the employer's written warning to cease specific provocative activity. The employees had been warned that—in view of "the ample legal remedies" available to them—their actions were a "deliberate and unjustified attempt to injure your employer." 192 NLRB at 182.

Moreover, the record clearly showed that the two employees were engaged in a "premeditated" and "deliberate" public attack upon their employer's reputation and business. First by a press and radio conference, and thereafter by picketing and handbilling in front of the store, during their off-hours but while they continued on the payroll, the employees sought to "ENCOURAGE ALL OUR PEOPLE TO TAKE THEIR MONEY OUT OF THIS RACIST STORE." The invective was exceedingly sharp, referring to their employer as a "RACIST PIG" and the establishment as a "20TH CENTURY COLONIAL PLANTATION," and equating the treatment of black employees at the store with that in the "SLAVE MINES OF AFRICA."

The Trial Examiner found that such a verbal assault "would have a graver potential [for injury] than an attack on the store's merchandise, and the public would be in no better position to determine the truth or falsity of the accusations." 192 NLRB at 184, 185. Noting, too, that such abusive language if addressed directly to a supervisor during working hours would most certainly have been unprotected by the Act, the Trial Examiner concluded that "the employer suffers far greater injury when such accusations and abusive terms are addressed to the general public and used as incitation to boycott." 192 NLRB at 184.

In sum, the findings below amply support the conclusion which follows inexorably from the reasoning of this Court in *Jefferson Standard* and its progeny, that the "means" used by these employees in their protest amounted to such extreme disloyalty, disrespect and disobedience as to render them unfit for further service and to deprive them of the protection of Section 7. The failure of the Board and the court below to so hold, however, leaves open the possibility that a decision by this Court sustaining the Board's dismissal of the complaint solely on the basis of the exclusivity doctrine will raise doubts as to the vitality of *Jefferson Standard*. Under these circumstances, and because the disloyalty issue is of broad and substantial public importance, it is submitted that this Court should expressly confirm that the particular means chosen by these employees to effectuate their protest were so disloyal as to deprive them of the protection of the Act.

Conclusion

For all of the foregoing reasons, as well as for those presented by petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE

This brief[1] is filed on behalf of The Chamber of Commerce of the United States of America, a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, and an underlying membership of more than five million business firms and individuals. The Chamber is the largest association of business and professional organizations in the United States.

The issue presented in this case—"whether," as stated by Judge Wyzanski below, "after the employees in a collective bargaining unit have selected a representative in accordance with . . . [the National Labor Relations] Act those in a minority are free to bargain with their employer concerning class conditions of alleged racial discrimination within that unit" (Pet. App. in No. 73-696, p. 41)—is a matter of significant national concern. The Court of Appeals' affirmative answer necessarily presumes that the Act's majority-rule concept, which "today is unquestionably at the center of our federal labor policy" (*N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180 (1967)), is simply not applicable where there is asserted racial or other forbidden discrimination. This erosion of "the essential principle of collective bargaining . . . [and] the mode of collective bargaining which the statute has ordained" (*Medo Photo Supply Corporation* v. *N. L. R. B.*, 321 U. S. 678, 684 (1944)), precludes, in a critical and sensitive area, "effective bargaining . . . [S]mall groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer . . . [in denigration of the] whole purpose of the Act . . ."

1. This brief is filed with the written consent of all parties which, pursuant to Supreme Court Rule 42, have been lodged with the Clerk of the Court.

N. L. R. B. v. *Draper Corporation*, 145 F. 2d 199, 203 (4th Cir. 1944).

The decision below creates, in the Chamber's opinion, an unworkable and dangerous "exception to the usual rule of exclusivity" (Pet. App. in No. 73-696, p. 42) without concommitantly enhancing the objectives of the anti-discrimination laws. The interest of the Chamber, accordingly, is based on the far-reaching consequences that affirmance of the decision below will have for American industry.

ARGUMENT

1. The instant case arises from the discharge of two self-appointed representatives of the Emporium's minority employees who sought, through picketing and a boycott, to derogate the authority of their statutory bargaining agent in order to force the Company to bargain directly with them. Pet. App. in No. 73-696, p. 41.[2] This case does *not* involve, as the Board's petition notes (p. 19, n. 15), a situation where a union has failed to fulfill its bargaining obligations, nor does it present an

2. The Court of Appeals assumed that it was requiring the Emporium "to bargain with the minority." Pet. App. in No. 73-696, p. 29. The employees did not picket in order to apply pressure in support of their Union's discussions with the Employer, but, instead, were primarily intent upon obtaining direct discussions with the "President [of Emporium] to try *to reach an agreement* with him to straighten out the problem and conditions of the Emporium." Appendix below, p. 60 (emphasis added). As the Board concluded, the Emporium was faced with "nothing short of a demand that [it] bargain with picketing employees for the entire group of minority employees" within the bargaining unit represented by the Union. Pet. App. in No. 73-696, pp. 103-104. Accordingly, the Board sustained the discharges because the employees' purpose was ". . . to initiate direct negotiations with [the Emporium] . . . by picketing and boycott activities [which are] . . . not protected by the Act." Pet. App. in No. 73-696,, p. 55, n. 2. See, e.g., *Bldg. and Const. Trades Council* v. *N. L. R. B.*, 306 F. 2d 677, 681 (D. C. Cir. 1968); *Hoisting and Portable Eng'rs. Local 101*, 146 NLRB 1175 (1963); and *National Packing Co.* v. *N. L. R. B.*, 377 F. 2d 800 (10th Cir. 1967).

instance where the employees engaged in publicity activities outside the work setting or otherwise did not interfere with the collective bargaining relationship. The court below prohibited employee discipline here notwithstanding (1) that the employees had necessarily "rendered ineffective the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement", and (2) that this method had been successfully pursued in good faith, in accord with the suggestions of both state and federal civil rights representatives, in order to provide "some orderly legal procedures that would have some long lasting effect". *Id.* at 24, 27, 83, 85 and 90. In lieu of this manifestly reasonable exercise of the Union's bargaining discretion (see *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1952)) the Court of Appeals imposed a standard which, according to the Board, the "expert" entrusted by Congress to "effectuate national labor policy",[3] is impossible to administer and in direct conflict with the fundamental principles of such federal policy.

Both the Act as well as the collective bargaining agreement in this case, which contained a no-strike and general arbitration clause (Pet. App. in No. 73-696, p. 3), required not only that the Emporium "agree to bargain only with the union, but [that its] employees agree to bargain only through the union". *N. L. R. B.* v. *Draper Corporation*, 145 F. 2d at 204. The Union, nevertheless, in order to comply with the lower court's "most expedient and efficacious means" test (*Id.* at p. 28), was apparently required to picket the Company to protest the alleged discriminatory practices. And the Company was apparently required to tolerate, if the Union declined to take such action, unlawful[4] picketing by one or more self-styled minority

3. *Medo Photo Supply Corporation* v. *N. L. R. B.*, 321 U. S. at 684; *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963).

4. Section 8(b)(7) of the Act prohibits a "labor organization", a term encompassing the dissident employees in this case, from picketing an employer where, as here (see n. 2, *supra*), "an object"

representatives seeking their own bargaining rights. The area of employment discrimination was thus considered, similar to the Third Circuit's erroneous view in *Gateway Coal Company* v. *United Mine Workers*, 94 S. Ct. 629 (1974), that questions concerning safety were to be treated differently than other industrial disputes and not be subject to arbitration or an implied obligation not to strike, as another alleged "sui generis" exemption to "the usual federal policy [which] encourages arbitration of labor disputes." Indeed, the discharged employees here claimed to represent only certain minority groups; presumably, under the rationale of the court below, other individuals would similarly have the right to assert representative rights for other or even the same racial, sexual or religious groupings of employees and thereby further splinter the bargaining unit. As Mr. Justice Douglas recently admonished in *DeFunis* v. *Odegaard*, ... U. S. ..... (April 23, 1974; dissenting opinion), quoting from *Hughes* v. *Superior Court*, 339 U. S. 460, 464 (1950): "If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights . . ." An employer confronted by such a situation would surely have an impossible task of ascertaining which, if any, of these alleged representatives he owed a bargaining obligation particularly where, as would be likely, their various demands conflicted.

These are only a few[5] of the pandora's box of problems occasioned by the decision below. As the Board properly con-

is to force bargaining with the pickets and the employer has lawfully recognized another labor organization. See Note, 87 Harv. L. Rev. 656, 662-4 (1974). In these circumstances, as this Court recognized in *McDonnell Douglas Corporation* v. *Green*, 411 U. S. 792 (1973), relying on Labor Act authority permitting the discharge of employees who engage in an illegal strike, "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."

5. Other potential difficulties are discussed in Note, 79 Harv. L. Rev. at 659-662: the difficulty of an employer choosing whether to discipline dissident employees and run the risk of an Emporium 8(a)(1) violation or, on the other hand, bargain with the minority

cluded, and other circuits have recognized in similar circumstances,[6] protection of the conduct here involved "would seriously undermine the right of employees to bargain collectively . . . handicap and prejudice the employees' duly designated representative . . . and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid collective agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under that agreement". Pet. App. in No. 73-696, pp. 104-105.

2. Neither Title VII nor this Court's decision in *Alexander* v. *Gardner-Denver Company*, 94 S. Ct. 1011 (1974), command a different result. Here, unlike *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31 (1941), the Board has not promulgated a specific remedy which directly vitiated the effectiveness of a separate statutory prohibition. As the Board demonstrates in its petition (pp. 16-18), if the employees' activities here "were contrary to the policies of, and thus unprotected by, the National Labor Relations Act . . . they would not be sanctioned by Section 704(a) of Title VII." Nothing in Title VII requires an abandonment by the Board of "an independent inquiry into the requirements of its own statute" nor "mechanical . . . accept [ance of] standards elaborated by another agency under a different statute for wholly different purposes." *Local 1976, Carpenters* v. *N. L. R. B.*, 357 U. S. 93, 111 (1958).

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and risk a potential 8(a)(5) refusal to bargain charge by the incumbent union; the frustration of the voluntary compliance policy underlying Title VII; the unfair dilemma faced by the statutory bargaining representative even if it correctly determines, contrary to the good faith belief of certain employees, that no discrimination exists; and the burden placed on the Labor Board in developing standards as to the scope of Title VII and the danger that such standards may conflict with the criteria utilized by the E. E. O. C. and the courts.

6. See, e.g., *N. L. R. B.* v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216 (9th Cir. 1969), and 349 F. 2d 1 (9th Cir. 1965); *N. L. R. B.* v. *Shop Rite Foods, Inc.*, 430 F. 2d 786 (5th Cir. 1970); and *Moore* v. *Sunbeam Corporation*, 459 F. 2d 811 (7th Cir. 1972).

This is also the lesson of *Alexander*. There this Court held that a prior arbitral decision does not foreclose a private right of action under Title VII; that the Civil Rights Act "manifests a congressional intent to allow an individual to pursue independently his rights under Title VII and other applicable state and federal statutes." 94 S. Ct. at 1019. *Alexander* in no way suggests, however, that such other rights may be pursued in a manner which defeats the policies—as, e.g., those expressed in Sections 9 and 8(b)(7) of the Labor Act (see n. 4, *supra*) —of the other legislation. The legislative history of Title VII relied on in *Alexander* demonstrates that Congress sought only to preserve—not extend or alter—other existing remedies and to leave those laws unaffected by the Civil Rights Act. 94 S. Ct. at 1019-20, n. 9.

3. The decision below is predicated, in large part, on the assumption that, because "the Union and the [dissidents] . . . were *not* working at cross-purposes," any interference with the collective bargaining process or inconvenience to the Company was "limited". Pet. App. in No. 73-696, pp. 24-29 (emphasis the court's). This assumption is incorrect. While there may have been agreement as to the ultimate goal of eradicating employment discrimination, "disputes over tactics and timing can be as disruptive as disputes over goals. . . . It is thus legally possible for the union and the dissidents to take different positions on the use of quotas, seniority systems, training programs and other forms of affirmative action". Note, 87 Harv. L. Rev. at 661-662. In such a case, the effectiveness of the union and its united front in negotiations with management will necessarily be undermined. The usual labor organization accommodation between competiting interests and desires, involving "a melange of power, numerical strength, mutual aid, prejudice and emotion" (Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 626-27 (1956)), would no longer be feasible. There was, therefore, as Judge Wyzanski correctly perceived below, an inherent conflict between the Union and the dissident employees and a corollary interference with the collective bar-

gaining process. App. Pet. in No. 73-696, pp. 43-45; cf. Note, *Title VII and NLRB: Protection of Extra-Union Opposition to Employment Discrimination,* 72 Mich. L. Rev. 313, 324-25 (1973); Gould, *Black Power in the Unions: The Impact on Collective Bargaining Relationships,* 79 Yale L. J. 46, 59-60 (1969);[7] and *N. L. R. B.* v. *R. C. Can Co.,* 328 F. 2d 974, 979 (5th Cir. 1964) (dissident activities are protected only "so long as the means used do not involve a disagreement with, repudiation or criticism of a policy or decision previously taken by a union, such as, for example, a no-strike pledge, a cooling off period, or the like during negotiations").[8]

4. The self-help measures utilized by the dissident employees also cannot be justified on the ground that there was no other effective alternative to rectify the alleged discrimination. To the contrary, there are a wide variety of legal weapons to redress such grievances: unfair labor practice charges and other sanctions under the National Labor Relations Act;[9] private, E. E. O. C. or Attorney General "pattern and practice" actions, including suits for temporary injunctive relief,

7. There are, as Gould notes, a wide variety of related areas where a union-dissident conflict might become even more apparent, for example, a dissident demand for reparations based on alleged company involvement in the subrogation of Black employees or a minority work stoppage aimed at forcing the company to recognize the anniversary of Martin Luther King's death as a holiday. Gould, 79 Yale L. J. at 63-64.

8. Even the permissive *R. C. Can* approach, a view restricted and criticized by the majority of decisions which have protected minority picketing "only when it is not disruptive of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position" (App. Pet. in No. 73-696, p. 17, and n. 26), must admittedly be "applied with great care . . . [lest it not] allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining." *N. L. R. B.* v. *Shop Rite Foods, Inc.,* 430 F. 2d 786, 790-91 (5th Cir. 1970).

9. See, e.g., *Packinghouse Workers Union* v. *N. L. R. B.,* 396 F. 2d 677, 683 (D. C. Cir. 1968); *N. L. R. B.* v. *Tanner Motor Livery, Ltd.,* 419 F. 2d 216, 218-19 (9th Cir. 1969); and *Local No. 12, Rubber Workers* v. *N. L. R. B.,* 368 F. 2d 12 (5th Cir. 1966), *cert. den.,* 389 U. S. 837 (1967).

under Title VII;[10] varied relief under state and federal civil rights statutes, executive orders and regulations; and a contractual remedy under the anti-discrimination provisions of the Company-Union collective bargaining agreement. Reliance on the Union's efforts to resolve the problem contractually, moreover, as *Alexander* makes clear (see p. 7, *supra*) would not bar resort to any of these other forums; the various remedies are parallel and overlapping. Finally, and perhaps most significant, a labor organization's duty of fair representation stands as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 181 (1967); *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967). As the court below recognized, "if the Union were not working to eradicate racially discriminatory employment practices, it would not only be violating its statutory duty of fair representation . . . but also committing an unfair labor practice . . ." App. Pet. in No. 73-696, p. 26, n. 38.

If, nevertheless, additional assurance is necessary to insure that unions properly represent minority employees, it is these other remedies, and in particular the duty of fair representation, that should be altered. A more stringent standard as to whether a labor organization has, in fact, made a good faith effort to remedy discrimination may, for example, be imposed. Such a modification would place the burden of action on the union purportedly at fault who would also be privy, unlike an employer, to intra-union deliberations as to whether there is reasonable cause to believe discrimination exists and, if so, whether the "most expeditious and efficacious means" of rectification have, in fact, been utilized. Surely this is a better solution, if one is needed, than radically restructing the majority-rule concept underlying our national labor policy.

10. See Sections 706(e) and (f) and 707 of Title VII, 42 U. S. C. §§ 2000e-5(e-f) and 2000e-6 (1970). In such cases a court may appoint counsel, award attorneys' fees and grant relief or order affirmative action on an individual or class-wide basis. See Sections 706(e), (g) and (k) of Title VII, 42 U. S. C. §§ 2000e-5(e), (g) and (k) (1970).

CONCLUSION

For the reasons stated above, as well as for those presented by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1973

THE EMPORIUM CAPWELL CO., *Petitioner,*

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, *Respondent.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WESTERN ADDITION COMMUNITY ORGANIZATION, *Respondent.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae*, in support of the position of the National Labor Relations Board, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

The question in this case is whether § 7 of the National Labor Relations Act protects employees from being discharged for engaging in picketing and other concerted

activity, the purpose of which is to secure acquiesence to their "demand that [their Employer] bargain with the picketing employees for the entire group of [its] minority employees," (485 F.2d at 929, n. 34), concerning the latter's alleged practice of racial discrimination in making promotions and in other aspects of employment, where the picketing takes place in a context in which a union has been certified by the National Labor Relations Board as the exclusive bargaining representative both of the pickets and of the "minority employees" whom the pickets seek to represent, and the picketing employees' tactics are not sanctioned by the Union (which is seeking to resolve the dispute by pressing to arbitration grievances for alleged violations of a contractual "no discrimination" clause). Indeed, it warrents emphasis that the foregoing question as to the scope of the *NLRA's* prohibition of discharges for concerted activity is the sole question presented since this proceeding does not involve any charge against the Employer under other federal (or state) laws, and since there are no charges of unlawful conduct against the pickets.

The Board held that § 7 does not protect the class of concerted activity here involved. (192 NLRB No. 19) The Court of Appeals, however, held that § 7 does protect such concerted activity except in those cases in which the Board concludes "the union was actually remedying the [alleged racial] discrimination to the *fullest extent possible, by the most expedient and efficacious means.*" (485 F.2d at 931; emphasis in original). The D. C. Circuit's holding was premised on the understanding that the question before it was *res nova* and that it was free to write on a clean slate. That assumption is entirely incorrect. For, as we now demonstrate, this Court's decisions, most particularly *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, and its

progeny, are rooted in an understanding of what the NLRA is all about that mandates the conclusion reached by the Board.

1. (a) Prior to the passage of the NLRA, the employers now covered by that Act had a privilege under federal law (as well as state law) to discharge their employees for good reason, bad reason or no reason at all. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45. The purpose of § 8(a)(1) of the Act is to limit that freedom in those instances in which a discharge is for concerted activity protected by § 7 (*Id.* at 45-46.) But § 7 does not protect all forms of "concerted activity for the purpose of collective bargaining or other mutual aid or protection," or even all those which are peaceful and not independently unlawful. In *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, which was decided some 9 years prior to the enactment of § 301 (the provision which makes collective agreements legally enforceable), this Court after noting that the "legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made," (*id.* at 342), held:

> "[The Company] rightly understood that the men were irrevocably committed not to work in accordance with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer • • • Compare National Labor Relations Bd. v. Fansteel Metallurgical Corp. 306 U.S. 240." (*Id.* at 344.)

Thus, *Sands* stands for the proposition that to assure that the component portions of the Act are read to further, rather than to defeat, its ultimate purpose, self-help to support bargaining demands is within § 7's protective ambit only where the bargaining sought comports with the "practice and procedure of collective bargaining" that it was Congress' purpose to "encourag[e]," (§ 1).[1]

(b) It is well settled that once the members of an appropriate bargaining unit have selected their representative

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, • • • it exacts 'the negative duty to treat with no other.' National Labor Relations Bd. v. Jones & L. Steel Corp. 301 US 1, 44; and see Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 548, 549."
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> "[I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions. • • • J. I. Case Co. v. National Labor Relations Bd. [321 US 332]; cf. Order of R. Telegraphers v. Railway Exp. Agency [321 US 342].

[1] See also *International Union UAW* v. *Wisconsin Emp. Rel. Bd.*, 336 U.S. 245 and *Labor Board* v. *Insurance Agents International*, 361 U.S. 477, which "establish that [at least some form of concerted slowdowns are] not a protected concerted activity," (361 U.S. at 492-493). Of course, as *Insurance Agents* holds, the fact that activity is unprotected and that the NLRA does not limit the employer's privilege of discharge is not a predicate for the conclusion that that activity is "unlawful as a matter of federal law," (*id.* at 495).

• • • •

> **"That the Act 'carries the clear implication that employers shall not interfere' with the right of collective bargaining 'by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all,' was recognized by the reports of the congressional committees recommending the adoption of the bill which became the National Labor Relations Act. Sen. Rep. No. 573, 74th Cong. 1st Sess. p. 13; H. Rep. No. 1147, 74th Cong. 1st Sess, p. 20." (*Medo Photo Supply Co.* v. *Labor Board,* 321 U.S. 673, 683-684 & n. 2)**

In short, the "majority rule concept is today unquestionably at the center of our labor policy." (*NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180.)

(c) The conclusion that follows ineluctably is that § 7 does not protect self-help by a splinter group of employees in a bargaining unit that has chosen a § 9(a) representative to support the minority's demand that their employer bargain with them concerning some or all of their terms and conditions of employment. To be sure, under the NLRA the use of self-help in support of bargaining demands "is not a grudging exception," (*Insurance Agents,* 361 U.S. at 495). But, as *Sands* demonstrates, the Act does not sanction economic warfare for its own sake. Self-help "is part and parcel of the process of collective bargaining • • • [since it is] 'a prime motive power for agreements,'" (*Insurance Agents,* 361 U.S. at 488-489). Thus, self-help in support of bargaining demands like all other aspects of the collective bargaining process

> **"is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the**

employer." (H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20; 2 Legislative History of the National Labor Relations Act of 1935, p. 3070.)

And, the "collective agreements" the Act encourages are those negotiated by a majority representative and applicable to all members of the bargaining unit. The House Report, in the sentence after that just quoted, states "There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides." (*Id.*) Precisely because this is so, the reasoning of Judge Parker in *NLRB* v. *Draper Corp.*, 145 F.2d 199, 203, 205 (C.A.4), is unanswerable:

> "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace. • • • It is perfectly clear not only that the 'wild cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the act to promote. Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work.
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> "[M]inorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in that statute which protects them from discharge. In the absence of the statute, there was nothing in the law which forbade the discharge of strikers. There is nothing in the statute, properly construed, which protects from discharge those who strike in defiance of its provisions."[2]

[2] Of course, as Judge Parker was careful to observe in *Draper*, it was the circumstance that the strike was "in violation of rights established by the collective bargaining statute," (145 F.2d at 205), which deprived it of its protected character. He therefore distinguished "a strike which, although not justified, nevertheless accords with the rights of the parties under the National Labor Relations Act." (*Id.*, citing *Labor Board* v. *Mackay Radio Co.*, 304 U.S. 333, 344, where this Court said "The wisdom or unwisdom of the men, their justification or lack of it, in attributing to [their employer] an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute." within the protections of § 7. See also *Labor Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 16.)

Moreover, the proposition that *Draper's* rationale incorporates a proper understanding of the basic structure and purposes of the NLRA does not mean that the limits of the rule stated therein are self-evident. As the court below stated "[Its] boundaries • • • are by no means definite. The cases have not produced a uniform approach to determine when concerted activity by a minority of employees loses the protection of section 7 due to a conflict with the exclusivity of the bargaining representative provided by section 9(a)." (485 F.2d at 925-926) But the area of controversy has been whether unauthorized activity for the purpose of compelling an employer to engage in meaningful bargaining with a majority representative is protected, (see *NLRB* v. *R. C. Can Co.*, 328 F. 2d 974 (C.A. 5)), and not, whether unauthorized activity designed to compel the employer to bargain directly with a minority group is protected. For, while an argument can be made that the former is not inconsistent with the collective bargaining the NLRA seeks to encourage, it is plain that the latter can not be squared with the Act.

2. The upshot is, as Mr. Justice Brennan has recently explained:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (*Allis-Chalmers,* 388 U.S. at 180.)

After the most careful consideration Congress so structured the national labor policy because "the making of agreements [which is the ultimate aim of the NLRA] is impracticable in the absence of majority rule," (S. Rep. No. 573, 74th Cong. 1st Sess., p. 13, 1 Leg. Hist. (1935), p. 2313; see also H. Rep. No. 1147, 74th Cong. 1st Sess. p. 21; 1 Leg. Hist. (1935), p. 3071). And Congress reached this judgment after being fully advised both by the NAACP and by the Urban League that there were potential disadvantages therefrom for racial minorities. (See 1 Leg. Hist. (1935), pp. 1035-1036, 1059-1060.) These criticisms did not eventuate in a limitation on the majority rule concept because, as this Court has recognized, the NLRA, as it was proposed, and as it was enacted, contains compensating protections for individual employees (and minority groups) within a bargaining unit that by any calculus are more meaningful than the individuals' (or minority groups') pre-existing "power to order [their] own relations with [their] employer" that the Act "extinguishe[d]," (*Allis-Chalmers, supra.*). And, as this Court has also recognized, those protections apply uniformally to all individuals and minority

groups within a bargaining unit that find themselves at odds with the majority, and not only to racial minorities.[3]

The fountainhead of the relevant jurisprudence is *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 193, a suit challenging "restrictions on the employment of Negro firemen," negotiated by the exclusive representative of the firemen and the railroads in the southeast. (*Id.* at 194-196.) There the Supreme Court of Alabama:

> "construed the [RLA] not as creating the relationship of principal and agent between the members of the craft and the Brotherhood [representing the craft]; but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross." (*Id.* at 198)

This Court reversed. The essential premise of Chief

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[3] The added insights as to the Congressional purposes underlying the NLRA derived from the 1947 and 1959 amendments to the Act confirm this understanding. While there is nothing in those debates affirmatively sanctioning racial discrimination, in both instances Congress refused to amend the NLRA to add provisions specifically directed to remedy such discrimination. See 1 Legislative History of the Labor Management Relations Act of 1947, pp. 706-707 (rejection by Rep. Hartley of Rep. Marcantonio's FEPC amendment), p. 426 (Sen. Taft's explanation of the union shop proviso to § 8(a)(3)). See also the proviso to § 8(b)(1)(A) protecting "the right of a labor organization to proscribe its own rules with respect to the acquisition or retention of membership therein," the legislative history of which is fully described in *Allis-Chalmers,* 388 U.S. at 184-188. And see 2 Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (NLRB ed.), pp. 1648-1651 (rejection of Rep. Powell's amendment making racial, religious, national origin or sexual discrimination an unfair labor practice).

Justice Stone's opinion is that, under both the Railway Labor Act and the NLRA, where a bargaining unit has selected a majority representative, a racial minority in that unit does not have a right to bargain directly with their employer, even where the representative has acted in a manner antagonistic to the minority's interest:

> "Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. Virginian R. Co. v. System Federation, R. E. D. supra (300 US 545). The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. Order of Railroad Telegraphers v. Railway Exp. Agency, 321 US 342, and see under the like provisions of the National Labor Relations Act. J. I. Case Co. v. National Labor Relations Bd. 321 US 332, and Medo Photo Supply Corp. v. National Labor Relations Bd. 321 US 678." (*Id.* at 200.)

Indeed, the Court underlined this point by stating:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, *the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed.*" (*Id.* at 201-202; emphasis added.)

Because that is so, and in light of the structure and language of the provisions embodying the majority rule concept, the Court concluded:

> "While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.
>
> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Bd. supra (321 US 335), but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.
>
> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented • • • Without attempting to mark the allowable limits of differences in the terms

of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." (*Id.* at 202-203.)[4]

[4] Technically it is true as Chief Justice Stone stated that the RLA and the NLRA "deprive * * * the minority members of a [bargaining unit] of the right * * * to choose a representative of their own." (*Steele, supra.*) But the extent of that deprivation should not be overdrawn. In order to place the change in the law brought about by the present national labor policy in proper perspective it is necessary to remember the following: First, that the history of labor-management relations in this country allows no dispute with the basic truth that prior to the adoption of that policy there was an overriding "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association," (§ 1 of the Act). That, of course, was the very reason for the enactment of the NLRA. Second, that prior to 1935 there was no effective legal protection from discharge for an employee, or a group of employees (comprising either a majority or minority of the workforce) who demanded that their employer treat with them concerning their working conditions. That, of course, was the very reason for the inclusion in the NLRA of § 8(a)(1). Third, that prior to 1964 there was no effective legal protection for racial minorities against discrimination by their employer. That, of course, was the very reason for the enactment of Title VII of the Civil Rights Act of 1964. Finally, that, while it is true that but for the NLRA it is theoretically possible that an employer who was dealing with one group of employees would exercise the privilege of dealing also with another group comprising some or all of his racial minority employees, and that the result would be

Since in presently relevant respects the RLA and the NLRA are indistinguishable, the *Steele* rule governs NLRA majority representatives as well:

> "It is now well established that, as the exclusive bargaining representative of the employees in [the] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with [the employer], see Ford Motor Co. v. Huffman, 345 US 330; Syres v. Oil Workers International Union, 350 US 892, and in its enforcement of the resulting collective bargaining agreement, see Humphrey v. Moore, 375 US 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N. R. Co., 323 US 192; Tunstall v. Brotherhood of Locomotive Firemen, 323 US 210, and was soon extended to unions certified under the NLRA, see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. at 342." (*Vaca* v. *Sipes*, 386 U.S. 171, 177; see also *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299-300.

3. The lesson of the argument thus far is that the Court of Appeals' reading of the NLRA is entirely wrong in every particular. Whatever the protection of § 7 for "wildcat" activity may be, it does not extend to picketing and

concessions to the latter that improved their position at the expense of the former, as a practical matter such a result is unlikely in the extreme.

related activity to secure direct bargaining with a minority representative once a majority representative has been certified by the NLRB. (Pp. 3-7.) A failure by the majority representative to meet its obligation to the minority does not create a § 7 right in the minority to utilize self-help to secure direct bargaining; it creates a cause of action for enforcement of the duty of fair representation. (Pp. 8-13.) The standard to which the majority representative is held is freedom from "arbitrary or bad faith conduct," (*Lockridge*, 403 U.S. at 299); it does not encompass an obligation to remedy the minority's complaint "to the fullest extent possible, by the most expedient and efficacious means," (485 F.2d at 931). (Pp. 11-13.) Each of the foregoing propositions is fully applicable where the minority's complaint is racial discrimination; indeed, the first was reaffirmed, and the latter two were announced in *Steele*, where the precise breach of the duty of fair representation alleged was racial discrimination.

4. The same conclusions follow if the NLRA is not considered alone but against the background provided by Title VII of the Civil Rights Act.

(a) The Court of Appeals began its analysis of the interrelationship between the two by noting:

> "While these activities are the subject of review by the Board only because they are deemed to be 'concerted activities' within section 7 and also involving 'conditions of employment' within section 9(a), the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, coexisting and perhaps inconsistent policies embodied in other legislation. As the Supreme Court noted in Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 47 (1942):
>
> '[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.' " (485 F.2d at 927-928.)

But *Southern Steamship* (a case in which the Board had held that conduct that may have constituted a "mutiny" under §§ 292 and 293 of the Criminal Code was protected by § 7 of the NLRA) is a caution that an administrative agency is not to expand the rights generally declared in the statute which it administers so as to provide protection for conduct which another law specifically prohibits. Here, the court below wrenched that call for caution out of context and utilized it as a basis for remedying under the NLRA, the employer's discharge of the pickets for engaging in activity not protected by § 7 but possibly protected under Title VII of the Civil Rights Act, a statute whose enforcement Congress entrusted not the NLRB but to the courts and the EEOC. The interrelationship between statutes and tribunals here therefore parallels not that in *Southern Steamship* but that in *Carpenters Union* v. *Labor Board*, 357 U.S. 93.[5] Accordingly, as *Carpenters Union*

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[5] There Mr. Justice Frankfurter explained:

> "[T]he Board • • • suggests that we should go further and find that the [hot cargo] contract provisions in these cases are invalid as such because the secondary employers are common carriers subject to the Interstate Commerce Act.
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> • • • •
>
> "It is the [I.C.C.] that in the first instance must determine whether, because of certain compelling considerations, a

holds, the duty of the NLRB in this case was to decide

carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it. Other agencies of government, in interpreting and administering the provisions of statutes specifically entrusted to them for enforcement, must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication.

"But it is said that the Board is not enforcing the Interstate Commerce Act or interfering with the Commission's administration of that statute, but simply interpreting the prohibitions of its own statute in a way consistent with the carrier's obligations under the Interstate Commerce Act. Because of that Act a carrier cannot effectively consent not to handle the goods of a shipper. Since he cannot effectively consent, there is, under § 8(b)(4)(A), a 'strike or concerted refusal,' and a 'forcing or requiring' of the carrier to cease handling goods just as much as if no hot cargo clause existed. But the fact that the carrier's consent is not effective to relieve him from certain obligations under the Interstate Commerce Act does not necessarily mean that it is ineffective for all purposes, nor should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes. Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the national transportation policy. Whether there is a 'strike or concerted refusal,' or a 'forcing or requiring' of an employer to cease handling goods is a matter of the federal policy governing labor relations. The Board is not concerned with whether the carrier has performed its obligations to the shipper, but whether the union has performed its obligation not to induce employees in the manner proscribed by § 8(b)(4)(A). Common factors may emerge in the adjudication of these questions, but they are, nevertheless, distinct questions involving independent considerations. • • •

"The case is not like that in *Southern S.S. Co.* v. *NLRB*, 316

whether the Employer's discharge of the employees violated § 8(a)(1) of the NLRA, and to leave to other tribunals the question whether it violated Title VII. And, while in its interpretation of § 7 *Southern Steamship* limited that concept so as to exclude employee conduct which was prohibited by other law, that case does not stand for the converse proposition that concerted activity which is protected under some other statutory scheme is necessarily protected under § 7 when it is antithetical to the purposes of the NLRA.

(b) It is manifest from the legislative history of Title VII that the enactment of that provision did not in any way alter the scope of § 7 of the NLRA. While the existence of a wide-ranging federal statutory remedy for employment discrimination is now taken for granted, the prospects of enacting such a law were so dubious that both "President Kennedy and Robert Kennedy were opposed to including an FEPC section [in the Civil Rights Act] because they thought it would kill the bill." (B. Rustin, *The Blacks And The Unions,* Harper's Magazine, May, 1971,

U.S. 31, where the Board was admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives. A specific remedy ordered by the Board—reinstatement of employees who had engaged in a strike—worked directly to weaken the effectiveness of a statutory prohibition against mutiny by members of the crew of a vessel. Presumed illegality under the mutiny statute was not used to establish a violation of the labor statute. It was relied on to establish an abuse of discretion in giving a remedy. Much less was there any suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." (*Id.* at 108, 109-111)

pp. 73, 76.) One of the major reasons for its inclusion was that AFL-CIO President "George Meany pressed for it." (*Id.;* see also H. Rep. No. 1370, 87th Cong. 2nd Sess. pp. 4-5; Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2158-2159.) And the legislative situation was such that once Title VII had been included in the bill and had passed the House it could be enacted into law only if the support of at least two-thirds of the members of the Senate could be assured, and a conference with the House averted. For the opponents of any civil rights bill threatened a filibuster, both before Senate passage, and if that failed, on any conference report. The consequence was that the sponsors of the bill confined its scope, and particularly that of Title VII to meet the desires of certain key senators, and of the ranking Republican member of the House Judiciary Committee (Rep. McCulloch, the manager of the bill on the House side), whose approval was necessary to avoid a conference. (See Leg. Hist. (1964), pp. 3003, 3010.) The dynamic was therefore almost identical to that at the time of the 1947 amendments to the NLRA where the sponsors of the bill needed a two-thirds majority because of "a predictable presidential veto," (*Pipefitters* v. *United States,* 407 U.S. 385, 409). In construing the Civil Rights Act, as in construing the NLRA, "great weight" is therefore to be accorded the statements of the sponsors made "to assure colleagues who had reservations • • • and whose votes were necessary" to make possible the enactment of the legislature in any form. (*Id.*)

There is a further parallel between the legislative situations in 1947 and 1964 in that once again the opponents sought to defeat the legislature by overstating its scope. (Compare *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S.

270, 288.) Given the nature of the coalition supporting the measure Senator Hill of Alabama charged that enactment of Titles VI and VII of the bill would have serious adverse effects on union and employee rights under the NLRA. (See Leg. Hist. (1964), p. 3242.) Senator Clark, one of the floor managers of the bill, responded directly to Senator Hill's assertions and unequivocally denied them, inserting into the Record a Justice Department memorandum which said, in immediately pertinent part:

> "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. To what extent racial discrimination is covered by the NLRA is not entirely clear. I understand that the National Labor Relations Board has presently under consideration a case involving the duties of a labor organization with respect to discrimination because of race. At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of title VII are invoked, the remedies available are those set out in section 707(e), injunctive relief against continued discrimination, plus appropriate affirmative action including the payment of backpay. No court order issued under title VII could affect the status of a labor orga-

nization under the National Labor Relations Act or the Railway Labor Act, or deny to any union the benefits to which it is entitled under those statutes." (Leg. Hist. (1964), p. 3244).

Accordingly, the Court of Appeals' view that § 7 of the NLRA is to be expanded in light of Title VII of the Civil Rights Act, is contrary to intent of the sponsors of the Civil Rights Act, as well as having no basis in the NLRA.[6]

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[6] The Court of Appeals' reasoning is not strengthened by the language of § 704(a), the particular provision to which it pointed. (485 F.2d at 927) The report of the House Judiciary Committee, where this language originated, demonstrates that § 704(a) is narrowly conceived: "[This Section] makes it an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has made a charge, testified, assisted, or participated in any manner in the enforcement of the title." (H. Rep. No. 914, 88th Cong. 1st Sess., pp. 27-28, Leg. Hist. (1964), pp. 2027-2028.) That is not an explanation that supports the view that § 704(a), contrary to the overall philosophy of the Civil Rights Act which is to promote administrative and judicial redress of claims of racial discrimination (see *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 42 U.S.L.Wk. 4214, 4216), protects a form of self-help not protected by the NLRA. There is no other authoratative explanation of § 704(a) since Title VII was not the subject of a Senate Report and since there was no floor debate on that provision.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed and the cause remanded with directions to dismiss the petition for review and affirm the order of the Board.

Respectfully Submitted

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